U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

GARY MANSELL **ARB CASE NO. 2020-0060**

ALJ CASE NO. 2019-ERA-00010

COMPLAINANT, **DATE: May 12, 2022**

v.

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

Appearances:

For the Complainant:
Faye A. Schofield, Esq.; *Disability and Veterans Lawyers, LLC*; Panama City Beach, Florida

For the Respondent:
David D. Ayliffe, Esq.; Maria Gillen, Esq.; *Tennessee Valley Authority*; Knoxville, Tennessee

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (2005), as implemented by regulations codified at 29 C.F.R. Part 24 (2020). On July 20, 2020, the Administrative Law Judge (ALJ) issued a Decision and Order Granting Motion for Summary Decision (Decision).

Respondent appealed to the Administrative Review Board (ARB or Board). For the following reasons, we summarily **AFFIRM** the ALJ's Decision.

BACKGROUND

Complainant, Gary Mansell (Mansell), was a truck operator for Respondent, Tennessee Valley Authority (TVA). Mansell alleges that on December 31, 2015, he suffered an electric shock while working. He further alleges that his foreman failed to alert him to his workers' compensation rights and told him to "keep your mouth shut" about his injury.

He filed a claim for workers' compensation under the Federal Employees' Compensation Act (FECA) on December 27, 2016. On February 21, 2017, the Office of Workers' Compensation Programs (OWCP) denied Mansell's claim. Mansell challenged the denial and requested OWCP to reconsider its denial, which OWCP denied on May 21, 2018. Mansell then filed a second motion for reconsideration. OWCP denied Mansell's claim for workers' compensation for the third and final time on September 19, 2018.

On March 29, 2019, Mansell filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging retaliation under Section 211 of the ERA. OSHA dismissed the claim for untimeliness on April 8, 2019. Mansell appealed to the Office of Administrative Law Judges. The ALJ issued an Order to Show Cause, asking Mansell to present facts that would show why he was eligible for equitable tolling, or risk dismissal. The ALJ then issued a notice setting a hearing date, noting the timeliness issue would be addressed at the hearing.

On January 17, 2020, TVA filed a Motion to Dismiss. Mansell filed an opposition on January 30, 2020. On March 2, 2020, the ALJ issued an Order to Show Cause Why Motion to Dismiss Should Not Be Granted and Order Staying Discovery (Show Cause Order), inviting filings from all parties. Both parties responded to the ALJ's Show Cause Order.

On July 20, 2020, the ALJ issued a Decision and Order Granting Motion for Summary Decision, construing Respondent's Motion to Dismiss as a Motion for Summary Judgement.

Mansell timely appealed to the ARB.

JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the ERA.[1] The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under ERA.[2] The ARB reviews an ALJ's orders on motions to dismiss and summary judgement de novo.[3] In reviewing summary decision cases, the Board reviews the record as a whole in the light most favorable to the non-moving party.[4]

DISCUSSION

To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, suffered an adverse personnel action, and that his protected activity was a contributing factor in the adverse personnel action taken against him or her. If a complainant's protected activity was a contributing factor in the adverse action, the employer may avoid liability only if it demonstrates "by clear and convincing evidence that it would have taken the same unfavorable personnel action" in the absence of the protected activity.[5]

On appeal, Mansell argues that the ALJ erred by treating the motion to dismiss as a motion for summary decision and that Mansell lacked notice of the possibility of a summary decision. Specifically, Mansell argues he did not have notice of the higher legal standard that would be applied in a motion for summary decision and was prejudiced by this lack of notice.[6] Mansell argues his response to

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[1] 42 U.S.C. § 5851; *Clem v. Comput. Scis. Corp.,* ARB No. 2020-0025, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 13 (ARB Mar. 10, 2021).

[2] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[3] *Johnson v. The Wellpoint Cos., Inc.*, ARB No. 2011-0035, ALJ No. 2010-SOX-00038, slip op. at 5 (ARB Feb. 25, 2013).

[4] *Tran v. S. Cal. Edison Co.,* ARB No. 2018-0024, ALJ No. 2017-ERA-00008, slip op. at 2 (ARB Oct. 24, 2019) (citing *Micallef v. Harrah's Rincon Casino & Resort*, ARB No. 2016-0095, ALJ No. 2015-SOX-00025, slip op. at 3 (ARB July 5, 2018)).

[5] 42 U.S.C. § 5851(b)(3)(C), (D); 29 C.F.R. § 24.109(b)(1); *Elliott v. Tenn. Valley Auth.*, ARB No. 2018-0002, ALJ No. 2013-ERA-00006, slip op. at 4 (ARB Sept. 22, 2020) (citing *Hoffman v. NextEra Energy, Inc.,* ARB No. 2012-0062; ALJ No. 2010-ERA-00011, slip op. at 6 (ARB Dec. 17, 2013)).

[6] While a motion to dismiss focuses solely on the allegations in the complaint and not whether evidence exists to support the allegations, a motion for summary decision may be granted when the record shows that there is "no genuine dispute as to any material fact

the ALJ's Show Cause Order did not account for including facts that would show there is a genuine issue of material fact in this case because he believed the response to Respondent's motion to dismiss did not need to be very detailed.

In general, the party bringing the motion for summary decision bears the initial responsibility of demonstrating the absence of a genuine issue of material fact.[7] Here, TVA brought a motion to dismiss that the ALJ later converted to a motion for summary decision. To prevail under a motion for summary decision, TVA must show that Mansell did not present evidence to support an essential element of his claim and that there are no disputes of material fact. To successfully oppose the motion, Mansell need not show that he will ultimately prevail on the merits of his complaint.[8] The summary decision standard requires only that Mansell establish the existence of "a fact dispute concerning the elements of his claim" that could affect the outcome of the case.[9] A moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[10] Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing."[11]

The Board reviews the entire record and determines whether the ALJ could rule in Mansell's favor.[12] The Board has long recognized that ALJs have an inherent authority to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[13] The regulations governing summary decision allow an ALJ

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and the moving party is entitled to decision as a matter of law." 29 C.F.R. §18.70(c); 29 C.F.R. § 18.72(a).

7 *Vinnett v. Mitsubishi Power Sys.*, ARB No. 2008-0104, ALJ No. 2006-ERA-00029, slip op. at 7 (ARB July 27, 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

8 *Id.*

9 *Id.* (quoting *Muino v. Florida Power & Light Co.*, ARB Nos. 06-092, -143, ALJ Nos. 2006-ERA-002, -008, slip op. at 8 (ARB Apr. 2, 2008)).

10 *Holland v. Ambassador Limousine/Ritz Transp.*, ARB No. 2007-0013, ALJ No.2005-STA-00050, slip. op at 2 (ARB Oct. 31, 2008) (quoting *Bobreski v. U.S. EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003)).

11 *Id.* at 3 (quoting 29 C.F.R. § 18.40(c)).

12 *Vinnett*, ARB No. 2008-0104, slip op. at 7 (citing *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

13 *Ho v. Air Wis. Airlines*, ARB Case No. 2020-0027, ALJ No. 2019-AIR-00009, slip op. at 4 (ARB June 30, 2021) (citations omitted); *see also* 29 C.F.R. § 18.12(b) ("[i]n all proceedings . . . the [ALJ] has all powers necessary to conduct fair and impartial proceedings").

to, without motion and upon notice, issue a decision for summary decision.[14] An ALJ's decision to convert a motion to dismiss into a motion for summary judgment is reviewed under an abuse of discretion standard.[15]

We conclude the ALJ did not abuse his discretion when he converted Respondent's motion to dismiss into a motion for summary decision. Mansell's mere conclusory assertion that the ALJ's decision would have been different under a motion to dismiss standard, standing alone, is not sufficient to demonstrate that he was prejudiced by the ALJ's decision to convert the motion.[16] We further conclude the ALJ appropriately granted summary decision because the Complainant failed to show that there was a dispute of material fact by failing to allege facts that, if true, were retaliation under the ERA. TVA prevailed as a matter of law. The ALJ's March 2, 2020 Show Cause Order highlighted the specific facts and information Mansell needed to provide in order for his whistleblower claim to survive and provided Mansell sufficient notice of the evidentiary requirements under the summary decision standard. We agree with the ALJ that Mansell's response to the Show Cause Order failed to address the deficiencies in his complaint that the ALJ had previously highlighted.

Upon consideration of the parties' briefs on appeal, and after reviewing the evidentiary record as a whole, we conclude the ALJ did not commit any reversible error in granting summary decision for TVA. Accordingly, we summarily **AFFIRM** the ALJ's decision. [17]

SO ORDERED.

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[14] 29 C.F.R. § 18.72(f) ("[T]he judge may [. . . c]onsider summary decision on the judge's own after identifying for the parties material facts that may not be genuinely in dispute").

[15] *See Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1104-05 (6th Cir. 2010) (reviewing a district court's decision to convert a motion to dismiss into a motion for summary judgment for abuse of discretion); *see also Saporito v. Publix Super Mkts., Inc.*, ARB No. 2012-0109, ALJ No. 2010-CPS-00001, slip op. at 3-4 (ARB Apr. 30, 2013) ("The ARB reviews an ALJ's determinations on procedural issues under an abuse of discretion standard.").

[16] A failure to provide sufficient notice warrants a reversal only if there was prejudice to the non-moving party. An otherwise improper conversion will be excused for harmless error. *Tackett v. M&G Polymers, USA, LLC*, 561 F.3d 478, 487-88 (6th Cir. 2009).

[17] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).