U.S. Department of Labor

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

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

FIVE M's, LLC, d/b/a L&W AUTO SALVAGE (L&W AUTO PARTS) and JOHN MORGAVAN,

and

FIVE M's LLC, d/b/a VALPARAISO CAR CARE TRANSMISSION and JOHN MORGAVAN,

RESPONDENTS.

ARB CASE NO. 2019-0014

ALJ CASE NOS. 2015-FLS-00010
2015-FLS-00011

DATE: April 15, 2022

Appearances:

For the Prosecuting Party, Administrator, Wage and Hour Division:
Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Paul L. Frieden, Esq.; Sara A. Conrath, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondents:
Gordon A. Etzler, Esq.; *Gordon A. Etzler & Associates, LLP*; Valparaiso, Indiana

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

ORDER DENYING RECONSIDERATION

PER CURIAM. This case arises under the Fair Labor Standards Act (FLSA), as amended, and its implementing regulations.[1] The United States Department of Labor's Wage and Hour Division (WHD) determined that Respondents Five M's, LLC, d/b/a L&W Auto Salvage (L&W), Five M's LLC, d/b/a Valparaiso Car Care Transmission (Valparaiso), and John Morgavan (Morgavan) (collectively, Respondents)[2] violated the FLSA's overtime and minimum wage requirements.[3] Among other things, the WHD assessed civil money penalties (CMPs) against Respondents in the amount of $1,100 per violation for each of the thirty-five employees that the WHD determined were underpaid, for a total of $38,500.

Respondents objected to the WHD's assessment, and the matter was assigned to an Administrative Law Judge (ALJ). After a hearing, the ALJ reduced the CMPs to $250 per violation, for a total of $8,750. The Administrator of the WHD appealed the ALJ's decision to the Administrative Review Board (ARB or the Board). On November 13, 2020, the ARB issued a decision that ordered Respondents to pay CMPs of $550 per violation, for a total of $19,250.

On March 9, 2022, the ARB received a letter from John Morgavan challenging the Board's decision and stating that he believed "the decision made [by the ALJ] is fair and should be upheld." We consider Morgavan's letter to be a request for the Board to reconsider its decision.

The ARB may reconsider its decision upon the filing of a motion for reconsideration within a "reasonable time" of the date on which the Board issued its decision.[4] In applying this timeliness requirement, "[t]he Board and its predecessors have presumed a petition timely when the petition was filed within a short time

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[1] 29 U.S.C. §§ 201-219 (2018), as implemented by the regulations at 29 C.F.R. Part 578 (2020).

[2] Five M's, LLC (Five M's) is the parent company of auto-related businesses: L&W, a salvage yard, Valparaiso, a repair shop, and Premier Auto Sales (Premier), a car dealership. Premier is not a respondent in this case. Morgavan is an owner of Five M's and directs and controls its operations. *Adm'r, Wage & Hour Division. U.S. Dep't of Labor v. Five M's, LLC (Five M's)*, ARB No. 2019-0014, ALJ Nos. 2015-FLS-00010, -00011, slip op. at 2 (ARB Nov. 13, 2020).

[3] *See* 29 U.S.C. §§ 206 (minimum wage), 207 (overtime).

[4] *Henrich v. Ecolab, Inc.*, ARB No. 2005-0030, ALJ No. 2004-SOX-00051, slip op. at 11 (ARB May 30, 2007).

after the decision."[5] The Board has also "granted reconsideration where a petition, though filed after a longer period, raised Rule 60(b)-type grounds or showed 'good cause' for the delay."[6]

The Board has typically found that a "short period" is twelve days or less.[7] In comparison and by way of example, the Board has determined that motions for reconsideration filed thirty-four days, sixty days, and four months after the Board's decision were not timely.[8] The Board issued its decision in this case on November 13, 2020, but Morgavan did not submit his request for reconsideration until March 9, 2022. Thus, Morgavan's letter, submitted nearly sixteen months after the Board's decision, was not filed within a "short time." Morgavan has also not raised any Rule 60(b)-type grounds for reconsideration,[9] and has not shown good cause for his delay in filing his request for reconsideration.[10] Accordingly, we conclude that Morgavan's motion was not filed within a "reasonable time" after the Board entered its decision.

Even if Morgavan's request for reconsideration had been timely, we would nevertheless deny reconsideration. The Board generally will only reconsider its decision if the movant demonstrates:

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5 *Id.* at 15.

6 *Id.*

7 *Id.* at 12 n.27, 17 (collecting cases).

8 *Id.* at 17 (60 days); *Powers v. Paper, Allied-Indus. Chem. & Energy Workers Int'l Union*, ARB No. 2004-0111, ALJ No. 2004-AIR-00019, slip op. at 4-5 (ARB Dec. 21, 2007) (thirty-four days); *Williams v. United Airlines, Inc.*, ARB No. 2008-0063, ALJ No. 2008-AIR-00003, slip op. at 2 (ARB June 23, 2010) (four months).

9 *See* FED.R.CIV.P. 60(b). Morgavan alleges that the attorney who conducted his deposition had a "vendetta" against him and the Department's only concern is "to impose the maximum statutory penalty." To the extent he believes this led to "fraud . . . , misrepresentation, or misconduct" by the Department under Rule 60(b)(3), he has not pointed to any evidence to support his assertion.

10 Morgavan asserts that he was not aware of the Administrator's appeal or the Board's decision until November 2021. Morgavan was represented by counsel during the ALJ proceedings and during the appeal to the Board, and the Board's decision was sent to Morgavan's counsel. Morgavan has not asserted or provided evidence that his counsel did not receive the Board's decision. Notice to a party's representative is deemed to be notice to the party himself. *Ramirez v. Norfolk S. Ry. Co.*, ARB No. 2017-0003, ALJ No. 2016-FRS-00022, slip op. at 3 (ARB Jan. 12, 2017) (citing *Zahara v. SLM Corp.*, ARB No. 2008-0020, ALJ No. 2006-SOX-00130, slip op. at 3 (ARB Mar. 7, 2008); *Lotspeich v. Starke Mem'l Hosp.*, ARB No. 2005-0072, ALJ No. 2005-SOX-00014, slip op. at 4 (ARB July 31, 2006)). Furthermore, even if Morgavan did not have actual or constructive notice of the ARB's decision when it was issued, he acknowledged that he was aware of the decision at least four months before he submitted his request for reconsideration. Under the circumstances of this case, four months is not a "short time" for purposes of reconsideration.

> (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 material facts presented to the court before its decision.[11]

Morgavan appears to suggest that the Board failed to consider material facts presented to the ALJ or the Board that would alter the outcome of the case. Morgavan's arguments do not convince us to reconsider our decision.

Morgavan first asserts that the WHD found violations with respect to two of his companies, L&W and Valparaiso, but not his third company, Premier. Morgavan does not explain the relevance of this point, but he appears to be suggesting that the lack of violations with respect to Premier should be considered as a mitigating factor when assessing the CMPs or that Premier's compliance with the FLSA suggests that his other companies complied as well. The fact that one of Morgavan's companies may not have violated the law in this instance does not excuse the violations of Morgavan and his two other companies and does not negate or mitigate the factors warranting the CMP imposed by the Board.

Morgavan next asserts that the allegations prompting the WHD's investigations of Respondents in 2005, 2012, and 2014 all "came from the same person" (who he does not identify), that the attorney representing the Administrator had a "vendetta" against him (for reasons he does not explain), and that one of his employees was angry with the company and provided false information about a minor performing unauthorized work in violation of the FLSA (an issue for which the ALJ found in Morgavan's favor and which the Administrator did not appeal to the Board). Morgavan appears to be suggesting that these circumstances show that the charges against his company were meritless and motivated by personal spite. He did not point to any evidence to substantiate these assertions, and they do not give the Board any reason to reconsider the veracity or weight of the evidence supporting the Board's assessment of CMPs.

Morgavan also asserts that "it was only two possible employees that were owed anything." Morgavan does not identify who the two employees were, or what evidence could lead to this conclusion. As we stated in our decision, Respondents owed two employees approximately half of the back wages identified in this case.[12]

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[11] *Getman v. Southwest Secs., Inc.*, ARB No. 2004-0059, ALJ No. 2003-SOX-00008, slip op. at 1-2 (ARB Mar. 7, 2006).

[12] *Five M's*, ARB No. 2019-0014, slip op. at 13.

Even so, the FLSA violations extended to other employees as well, even if to a lesser degree.

Finally, Morgavan asserts that he paid $14,477.06 "to release the civil judgment in January of 2022." Morgavan appears to be referring to a payment he made to satisfy a judgment against Respondents from the United States District Court for the Northern District of Indiana.[13] The District Court Judgment concerned back wages and liquidated damages under the FLSA. This administrative action concerns CMPs. The fact that Morgavan may have satisfied the District Court's judgment does not impact his obligation to pay the judgment in this case.

For the foregoing reasons, Morgavan's request for reconsideration is **DENIED**.

SO ORDERED.

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[13] *Perez v. Five M's*, No. 2:15cv176, 2017 WL 784204 (N.D.Ind. Mar. 1, 2017) (unpublished). The District Court ordered Morgavan to pay $28,954.12. *Id.* at *11. Respondents paid the Department of Labor half of that sum—$14,477.06—in June 2019. *Five M's*, ARB No. 2019-0014, slip op. at 13-15. Although it is not clear from Morgavan's letter, Morgavan's alleged payment of an additional $14,477.06 in January 2022 appears to be the balance owed on the District Court judgment.