U.S. Department of Labor

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

In the Matter of:

TAMMY MCFADDEN,

COMPLAINANT,

v.

DEUTSCHE BANK/DB USA CORE CORPORATION,

RESPONDENT.

ARB CASE NO. 2022-0002

ALJ CASE NO. 2021-SOX-00023

DATE: January 26, 2022

Appearances:

For the Complainant:
Brian P. McCafferty, Esq.; *McCafferty Law Firm, LLC*; Newtown, Pennsylvania

For the Respondent:
B. Tyler White, Esq. and Todd R. Dobry, Esq.; *Jackson Lewis P.C.*; Jacksonville, Florida

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell, *Administrative Appeals Judge*

ORDER OF REMAND

PER CURIAM. Tammy McFadden (Complainant) filed a complaint under the Sarbanes-Oxley Act of 2002[1] (SOX), as amended, and its implementing regulations,[2] alleging that Deutsche Bank (Respondent) unlawfully retaliated against her. After an investigation, the Occupational Safety and Health Administration (OSHA) dismissed her complaint. Complainant filed objections and requested a hearing with the Office of Administrative Law Judges (OALJ). Respondent filed a Motion to Dismiss. Complainant did not file an opposition to the motion. An Administrative Law Judge (ALJ) treated the motion as unopposed and granted it. We reverse the ALJ's order and remand the case for the ALJ to provide Complainant with leave to amend her complaint.

On May 1, 2018, Complainant filed a complaint with the Department of Labor, alleging that Respondent had unlawfully retaliated against her after she filed a "[g]rievance against [her] old manager for unethical violations."[3] Complainant alleged that she had "been the subject of unfair treatment, job discrimination and retaliation practices" since filing the grievance, including "termination/layoff, failure to promote, negative performance evaluation," and "harassment/intimidation." Complainant further alleged that management had "fostered 'bully tactics'" and purposely withheld work from her to "deflate productivity numbers."

On May 28, 2021, the Region IV Regional Administrator of OSHA (Administrator) issued findings on the matter, stating that there was no reasonable cause to believe Respondent had violated the SOX. On June 24, 2021, Complainant noted her objections to the findings and requested a hearing before an ALJ. On September 3, 2021, Respondent filed a Motion to Dismiss, arguing that Complainant had not pleaded any facts showing she engaged in protected activity

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[1] 18 U.S.C. § 1514A (2010).

[2] 29 C.F.R. Part 1980 (2021).

[3] Decision and Order at 2 (quoting Whistleblower Complaint of Tammy McFadden ECN30058 at 2 (May 1, 2018)).

under the SOX or that the alleged protected activities contributed to the adverse actions. Complainant did not file an opposition to the motion.

On September 24, 2021, the ALJ issued a Decision and Order Granting Respondent's Motion to Dismiss. The SOX provides that an employee engages in protected activity when providing information regarding conduct that the employee reasonably believes constitutes mail, wire, bank, or securities fraud to a supervisor.[4] The ALJ noted that the complaint to OSHA had alleged only that Respondent took action against her for filing a grievance against her manager for "unethical violations." The ALJ held that the allegation was insufficient to establish that Complainant had engaged in activity protected under the SOX and that, therefore, Complainant had failed to plead facts showing a *prima facie* violation. The ALJ also noted that Complainant had failed to respond to Respondent's motion and therefore regarded the motion as unopposed.[5] Thus, the ALJ dismissed the complaint.

Complainant filed a timely appeal of the ALJ's order. On appeal, Complainant argues that she did not receive the Motion to Dismiss before the ALJ granted it and therefore lacked the opportunity to respond. Complainant contends that she and her counsel only became aware of the motion when she received the ALJ's order and that her counsel did not obtain a copy of the motion until October 8, 2021, when Respondent's counsel emailed it to him. Complainant does not allege any wrongdoing by the ALJ or Respondent and suspects that an administrative or clerical error led to counsel not receiving the motion. Further, Complainant argues that the ALJ erred in holding that Complainant failed to show a *prima facie* case under the SOX.

A party may move to dismiss a complaint for failure to state a claim upon which relief can be granted.[6] In considering a motion to dismiss, an ALJ must accept the factual allegations in the complaint as true and draw all reasonable

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[4] 18 U.S.C. § 1514A(a)(1)(A).

[5] *See* 29 C.F.R. § 18.70(c) ("If the opposing party fails to respond [to a Motion to Dismiss], the judge may consider the motion unopposed.").

[6] 29 C.F.R. § 18.70(c).

inferences in the complainant's favor.[7] The Board reviews orders dismissing complaints de novo.[8]

The Board has held that ALJs should not apply the heightened pleading standard used in federal courts in SOX whistleblower complaints and that motions to dismiss SOX complaints for failure to state a claim are "highly disfavored."[9] The fair notice requirement is not a demanding standard.[10] We note that complainants file their initial complaints before OSHA in an informal manner and that OSHA amplifies those complaints through investigations. While OSHA's findings are part of the record, parties have the benefit of a de novo hearing before the ALJ. For these reasons, we have held that "ALJs should freely grant parties the opportunity to amend their initial filings to provide more information about their complaint before the complaint is dismissed," especially when "it appears that a complaint may be saved by the allegation of additional facts."[11] Otherwise, complainants would have to be mindful of the pleading standards when filing their complaint with OSHA, which would be "inappropriate given the nature of the administrative whistleblower complaint process."[12] Accordingly, "[d]ismissal without leave to amend is improper unless it is clear, upon do novo review, that the complaint could not be saved by any amendment."[13]

We therefore determine that the ALJ's order of dismissal was not warranted. Rather, the ALJ should have provided Complainant leave to amend her complaint

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[7] *Gallas v. The Med. Ctr. of Aurora*, ARB Nos. 2015-0076, 2016-0012, ALJ Nos. 2015-ACA-00005, 2015-SOX-00013, slip op. at 2 (ARB Apr. 28, 2017).

[8] *Id.*

[9] *Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 13 (ARB May 25, 2011).

[10] *Gallas*, ARB Nos. 2015-0076, 2016-0012, slip op. at 10.

[11] *Sylvester*, ARB No. 2007-0123, slip op. at 13; *Evans v. U.S. EPA*, ARB No. 2008-0059, ALJ No. 2008-CAA-00003, slip op. at 11 (ARB July 31, 2012) (quotation omitted). This includes information provided to OSHA during the investigatory phase of the complaint. *Id.* at 12.

[12] *Sylvester*, ARB No. 2007-0123, slip op. at 13; *Evans*, ARB No. 2008-0059, slip op. at 9.

[13] *Evans*, ARB No. 2008-0059, slip op. at 12 (quotation omitted).

to satisfy the pleading requirements of a SOX claim before the OALJ. While Complainant failed to respond to the Motion to Dismiss, thus leading the ALJ to understandably conclude that the motion was unopposed, the record nonetheless demonstrates that the issue with the pleadings could be rectified with additional information. It is unclear why Complainant failed to respond to the Motion to Dismiss. Respondent appropriately filed the motion using the Department of Labor's eFile system, and Complainant does not suggest that she did not receive any other filings. However, there is no further indication that Complainant, who filed timely objections to the Administrator's findings and appealed the ALJ's order, was not diligently pursuing her claim. Accordingly, we conclude that this procedural mishap should not interfere with the objective of facilitating a "decision on the merits, rather than on the pleadings or technicalities."[14]

We therefore **REVERSE** the ALJ's Order Granting Respondent's Motion to Dismiss and **REMAND** the case for the ALJ to grant Complainant leave to amend her complaint.

SO ORDERED.

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[14] *Id.* at 11-12 (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)).