U.S. Department of Labor

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

IN THE MATTER OF:

NORA MOREB,

COMPLAINANT,

v.

KERRY INC., d/b/a
KERRY INGREDIENTS AND FLAVOR,

RESPONDENT.

ARB CASE NO. 2023-0048

ALJ CASE NO. 2023-FDA-00014
ALJ DANA ROSEN

DATE: December 14, 2023

Before HARTHILL, Chief Administrative Appeals Judge, and PUST and ROLFE, Administrative Appeals Judges

DECISION AND ORDER OF REMAND

ROLFE, Administrative Appeals Judge:

This case arises from a complaint filed by Nora Moreb (Complainant) alleging retaliation in violation of the employee protection provisions of Section 402 of the Food Safety Modernization Act (FSMA) and its implementing regulations.[1] After issuing a show cause order asking the parties to brief why the case should not be dismissed for failure to comply with the time limits for appeal set by 29 C.F.R. § 1987.106(a), the Administrative Law Judge (ALJ) dismissed the case. Finding that time limit to be established by an agency-created claims-processing regulation rather than by a congressionally mandated jurisdictional rule, however, we hold the ALJ erred in sua sponte dismissing her claim.[2]

We thus reinstate Complainant's case and remand it to the ALJ for further proceedings consistent with this Decision and Order.

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[1] 21 U.S.C. § 399d; 29 C.F.R. Part 1987 (2023).

[2] *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. 17, 25-27 (2017) (court-made time limit for filing appeal was not jurisdictional but rather a mandatory claims processing rule subject to waiver and forfeiture).

PROCEDURAL BACKGROUND

On May 24, 2023, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) issued a final determination letter in response to Complainant's October 21, 2021 complaint.[3] OSHA found no cause to determine Complainant had suffered retaliation, dismissed the complaint, and advised Complainant the dismissal would become final unless she filed an objection and requested a hearing within thirty days of her receipt of the determination letter.[4]

The thirty-day appeal period, established by 29 C.F.R. § 1987.106(a), ended on June 23, 2023.[5] Complainant filed her objections and request for hearing on June 26, 2023—three days after the deadline expired.[6]

On July 12, 2023, the ALJ issued an Order for Complainant to Show Cause why her claim should not be dismissed. In a timely response, Complainant explained that OSHA's determination letter had been routed to her "junk" email box and she had not seen it until June 26, 2023, after she had requested a status update from OSHA and been advised of the letter. Respondent Kerry Inc. (Respondent), in turn, did not submit any response to the ALJ's order.[7]

On August 21, 2023, the ALJ issued a Decision and Order Dismissing Claim for Untimely Objections. The ALJ found that Complainant had missed the thirty-day regulatory deadline for filing an objection to OSHA's determination, which had thereafter become final and unreviewable.[8] The ALJ then concluded, on the particular facts of the case, that the deadline was not subject to equitable modification, and she dismissed the claim.[9]

This appeal followed.

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3 Decision and Order Dismissing Claim for Untimely Objections (D. & O.) at 1-2.

4 *Id*.

5 *Id*. at 2 (citing 29 C.F.R. § 1987.106(a)).

6 *Id*.

7 *Id*.

8 *Id.* (citing 29 C.F.R. § 1987.106(a) (30-day deadline to file an objection with the ALJ); 29 C.F.R. § 1987.106(b) (if no timely objection is filed, the OSHA finding becomes the final decision of the Secretary)).

9 *Id.* at 2-3.

DISCUSSION

1. Section 1987.106 is an Agency Created Mandatory Claims-Processing Regulation, Not a Congressionally Mandated Jurisdictional Rule.

In recent years, the United States Supreme Court, in its own words, has engaged in a crusade "to bring some discipline" to the use of the term "jurisdiction."[10] Properly understood, the Court has explained, "the word 'jurisdictional' is generally reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)."[11]

In addition, the Court has instructed that "Congress may make other prescriptions jurisdictional by incorporating them into a jurisdictional provision, as [it] has done with the amount-in-controversy requirement for federal-court diversity jurisdiction."[12] Finally, the Court has advised it will "treat a requirement as 'jurisdictional' when 'a long line of [Supreme] Cour[t] decisions left undisturbed by Congress' attached a jurisdictional label to the prescription.'"[13]

By contrast, non-jurisdictional claims-processing rules do not share these immutable traits. Often established by agency regulation instead of congressional action, they frequently "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.'"[14] And though those steps may be "mandatory" when the regulation is properly invoked, they do not create jurisdictional preconditions to filing or continuing litigation.[15]

OSHA's implementing regulation establishing the thirty-day deadline to object to a preliminary order and request a hearing under the FMSA unquestionably is of this latter ilk. Section 1987.106(a) states in relevant part:

> Any party who desires review, including judicial review, of the findings and/or preliminary order, or a respondent alleging that the complaint

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[10] *Henderson v. Shinseki*, 562 U.S 428, 435 (2011); *see also Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (labeling "jurisdiction" as "'a word of many, too many, meanings'") (citation omitted).

[11] *Fort Bend Cnty., Texas v. Davis*, 139 S. Ct. 1843, 1848 (2019) (citing *Kontrick,* 540 U.S. at 455).

[12] *Id.* at 1849.

[13] *Id.* (citing *Union Pac. R.R. Co. v. Locomotive Eng'rs*, 558 U.S. 67, 82 (2009) (other citation omitted)).

[14] *Henderson*, 562 U.S. at 435.

[15] *Fort Bend Cnty., Texas*, 139 S. Ct. at 1849.

> was frivolous or brought in bad faith who seeks an award of attorney fees under FMSA, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1987.105.[16]

The regulation does not in any way delineate either subject matter or personal jurisdiction under the FSMA. Nor has the thirty-day deadline been subsequently incorporated by Congress into a jurisdictional provision of the FSMA or been treated jurisdictionally by a long line of Supreme Court cases.

In short, the regulation is unambiguously non-jurisdictional by nature. And it therefore belongs among the quickly growing "array of mandatory claim-processing rules and other preconditions to relief" the Court has recently identified.[17]

That classification has consequences.

2. Unlike Jurisdictional Rules Which Must Be Enforced at Any Time by a Tribunal on Its Own Initiative, Mandatory Claims-Processing Rules Must Be Timely Raised *by the Parties* to Come into Play.

The distinction between jurisdictional rules and mandatory claims-processing regulations is dispositive here. Classifying a rule as jurisdictional "renders it unique in our adversarial system."[18] Unlike most arguments, challenges to jurisdiction may be raised by a defendant "at any point in the litigation," and tribunals *must* consider them sua sponte.[19] In that respect, "'harsh consequences' attend the jurisdictional brand."[20]

On the other hand, claims-processing rules can be somewhat less rigid in certain circumstances. To be sure, they still may be "mandatory" in the sense that a

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16 29 C.F.R. § 1987.106(a). Section 1987.106(b), in turn, specifies if no timely objection is filed "the findings and/or preliminary order will become the final decision of the Secretary, not subject to judicial review."

17 *Fort Bend Cnty., Texas*, 139 S. Ct. at 1849-50 (collecting numerous cases involving a significant array of similar civil claims-processing rules under a number of agency regulatory schemes, including "time prescriptions for procedural steps in judicial or agency forums."); *see also Wilkins v. United States*, 598 U.S. 152, 158 (2023) ("Courts will [] not assume that in creating a mundane claims-processing rule," Congress intended to create "'jurisdictional consequences.'") (citations omitted).

18 *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013).

19 *Fort Bend Cnty., Texas*, 139 S. Ct. at 1849 (citation omitted).

20 *Id.* (citing *United States v. Wong,* 575 U.S. 402, 409 (2015)).

court must enforce the rule if a party "properly raise[s]" it.[21] But an objection based on a mandatory claims-processing rule also normally is per se forfeited "'if the party asserting the rule waits too long to raise the point.'"[22] Tribunals thus are generally prohibited from raising noncompliance with them on their own accord,[23] and—unlike jurisdictional deadlines—they are subject to equitable tolling.[24]

The ALJ thus erred here by sua sponte dismissing this case without first requiring Respondent to at least raise noncompliance with 29 C.F.R. § 1987.106 as an affirmative defense. Indeed, the ALJ's show cause order and subsequent dismissal in some respects did not even realistically give Respondent *the opportunity* to raise that defense. Significantly, Supreme Court precedent further makes clear that sua sponte ordering parties to brief the application of a potentially dispositive mandatory claims-processing rule prior to dismissing a claim does not equate to a party timely raising noncompliance with the rule, nor cure an otherwise improper sua sponte dismissal.[25]

So, too, here.

We therefore find the ALJ erred in sua sponte dismissing Complainant's appeal, **REVERSE** that dismissal, and **REMAND** this case for further proceedings consistent with this order.

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[21] *Eberhart v. United States*, 546 U.S. 12, 19 (2005).

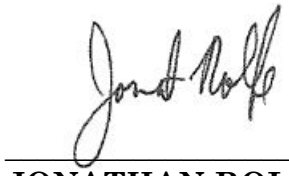
[22] *Id.* at 15 (citation omitted); *see also Fort Bend Cnty., Texas*, 139 S. Ct. at 1849.

[23] *See Hamer*, 583 U.S. at 21-22.

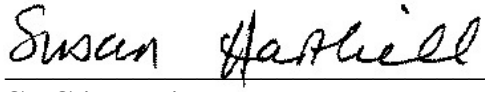
[24] *See Wilkins*, 598 U.S. at 164; *Boechler, P.C. v. Comm'r of Internal Revenue,* 596 U.S. 199, 209 n.1 (2022) (equitable tolling is not limited to Article III courts) (citations omitted); *Martin v. Paragon Foods*, ARB No. 2022-0058, ALJ No. 2021-FDA-00001, slip op. at 7 (ARB June 8, 2023) (citations omitted).

[25] *Hamer*, 583 U.S. at 22 (noting that "the Court of Appeals, on its own initiative, questioned the timeliness of the appeal and instructed the respondents to brief the issue" prior to incorrectly dismissing it under a claims-processing rule).

SO ORDERED.[26]



JONATHAN ROLFE
Administrative Appeals Judge



SUSAN HARTHILL
Chief Administrative Appeals Judge

TAMMY L. PUST
Administrative Appeals Judge

[26] Notably, we take no position at this point whether the ALJ was correct that equitable tolling would not save Complainant's complaint were it properly dismissed on remand under 29 C.F.R. § 1987.106. Moreover, we note that Complainant's opening brief to the Board was filed late and remind Complainant that the Board looks very unfavorably on late filed pleadings both below and at the Board and that she risks serious repercussions including dismissal should the practice continue.