In the Matter of:

THOMAS SAPORITO,

COMPLAINANT,

v.

FEDEX KINKO'S OFFICE AND PRINT SERVICES, INC.,

RESPONDENT,

and

FREDERICK SMITH, MICHAEL MOORE, KATHY LURO, LAVELLE HAYES, CAROL GRAVEL, JOSE OTAYZA, and SHERRI KRIEGER,

INDIVIDUAL RESPONDENTS.

ARB CASE NO. 06-043

ALJ CASE NO. 2005-CAA-018

DATE: March 31, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Thomas Saporito, *pro se,* North Palm Beach, Florida

For the Respondents:
Judd J. Goldberg, Esq., *Kirkpatrick & Lockhart Nicholson Graham LLP*, Miami, Florida

FINAL DECISION AND ORDER

Complainant Thomas Saporito filed a complaint with the Occupational Safety and Health Administration (OSHA), United States Department of Labor (DOL), on August 12, 2005, against FedEx Corporation, d/b/a FedEx Kinko's and seven named individuals, Frederick Smith, Michael Moore, Kathy Luro, Lavelle Hayes, Carol Gavel, Jose Otayza, and Sherri Kreiger. Saporito asserted that he was constructively discharged from his employment with FedEx Kinko's on June 3, 2005, in violation of the whistleblower protection provisions of the Clean Air Act, 42 U.S.C.A. § 7622 (West 2003); Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9610 (West 2005); Safe Drinking Water Act, 42 U.S.C.A. § 300j-9 (West 2003); Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 2003); and the Energy Reorganization Act, 42 U.S.C.A. § 5851a (West 2007) (collectively, the environmental whistleblower laws), and implementing regulations at 29 C.F.R. Part 24 (2007).[1] A DOL Administrative Law Judge (ALJ) issued a Final [Recommended] Decision and Order (R. D. & O.) on January 6, 2006, dismissing Saporito's complaint with prejudice. For reasons we explain, we grant dismissal with prejudice, but modify the basis.

BACKGROUND

Saporito began his employment with FedEx Kinko's on or about April 15, 2004, as a production operator at a store in North Palm Beach, Florida. Saporito claimed he "engaged in statutory protected activity by raising substantial environmental concerns regarding [FedEx Kinko's] disposal of ink cartridges, plastics and foam core board." Letter from Teresa A. Harrison, Deputy Regional Administrator, OSHA, to Thomas Saporito, dated Sept. 16, 2005. Saporito also asserted "he was exposed to a hostile work environment which ultimately forced him to resign." *Id.*

Saporito filed his whistleblower complaint with OSHA on August 14, 2005. He requested that OSHA issue a determination and provide a statement of appeal rights without delay. Consequently, OSHA wrote back to Saporito that "[w]ithout conducting a full investigation it is impossible to determine if [a] violation exists." *Id.* An OSHA deputy regional administrator dismissed the complaint. *Id*.

On appeal to an ALJ, the ALJ issued an Order to Show Cause why he should not dismiss Saporito's complaint. The ALJ noted that it did not appear that the Respondents were employers under the Energy Reorganization Act. Further, because Saporito left employment on June 3, 2005, and did not file his whistleblower complaint with OSHA until August 14, 2005, he had not filed his complaint within 30 days after the occurrence

[1] The environmental whistleblower laws's implementing regulations, found at 29 C.F.R. Part 24, have been amended since Saporito filed the complaint in this case. 72 Fed. Reg. 44,956 (Aug. 10, 2007). It is unnecessary for us to determine whether the amendments apply to Saporito's complaint because they are not implicated by the issue presented and thus, even if the amendments were applicable to this complaint, they would not affect our decision

of the alleged violation, as required under the environmental whistleblower laws. 29 C.F.R. § 24.3(b). The ALJ encouraged Saporito to seek the advice of an attorney. The ALJ granted an extension of time to respond to the order. Eventually, Saporito responded. He claimed that FedEx Kinko's had refused to re-hire him after his constructive discharge and raised theories of estoppel and tolling. Complainant's Response to Order to Show Cause.

"Upon consideration of [Saporito's] response to the show cause order," the ALJ found that he had "at least alleged legal and factual issues which are sufficient to satisfy the requirement of the show cause order." But the ALJ cautioned that "[t]his is not to be construed as a finding that the complaint is timely, but only that it will not be dismissed, *sua sponte*." Order, dated Dec. 5, 2005. The Order required the parties to file dispositive motions, if any, by December 19, 2005, and advised that the matter would be scheduled for a three-day hearing on the merits from February 6, 2006 through March 3, 2006. *Id*.

FedEx Kinko's filed an answer to Saporito's complaint, with affirmative defenses, affidavits regarding Saporito's alleged application for re-employment and a motion for an enlargement of time. Saporito requested reconsideration of the ALJ's decision to change the designation of the respondent in the case caption to FedEx Kinko's Office and Print Services, Inc. The ALJ issued a supplemental order on December 15, 2005, enlarging the time for filing dispositive motions to January 9. Order, dated Dec.15, 2005.

Saporito moved to withdraw his complaint on December 30, 2005, claiming he had been "economically disadvantaged" as a result of FedEx Kinko's' termination of his employment and his inability to obtain subsequent employment so that he could not compensate an attorney to represent him. Motion to Withdraw Complaint. "[W]ithout the benefit of an experienced attorney at law, [Saporito] would be disadvantaged in attempting to argue his case-in-chief at hearing . . .." *Id.*

In granting the request to withdraw the complaint, the ALJ stated:

> [W]hen a complaint is withdrawn, the determination by the investigating agency below becomes the final decision of the Secretary of Labor. As such, withdrawal of the complaint in the instant case[] is the equivalent of a request to withdraw his request for hearing. Although OSHA did not actually complete its investigation, the finding made by OSHA on September 16, 2005, included a determination that the complaint should be dismissed.

Final Order Dismissing Complaint, at 2. Accordingly, the ALJ "treated" the "request to withdraw [Saporito's] complaint . . . as a request to withdraw his request for hearing." Finally, "This matter is Dismissed *with prejudice.*" *Id.* (emphasis added).

Saporito then filed a timely Petition for Review before the Administrative Review Board (ARB), raising as the only issue before us that the withdrawal of his complaint should have been granted *without prejudice*.

DISCUSSION

We have jurisdiction to review the ALJ's decision. *See* Secretary's Order 1-2002, 76 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating the Secretary's authority to review ALJ recommended decisions issued under the environmental whistleblower statutes set out at 29 C.F.R. § 24.100, 24.110. We review questions of law de novo. 5 U.S.C.A. § 557(b) (West 1996). We deem determining what rule of law applies to the dismissal of the complaint in this action to be a question of law.

In *Sabin v. Yellow Freight Sys., Inc.*, ARB No. 04-032, ALJ No. 2003-STA-005 (ARB July 29, 2005), we discussed the distinction between withdrawing a complaint to OSHA and withdrawing an appeal of OSHA's findings. *Sabin* arose under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1997), and the implementing regulations at 29 C.F.R. Part 1978 (2004). After OSHA investigated his whistleblowing complaint and determined that Yellow Freight terminated Sabin's employment for a legitimate, non-discriminatory reason and not his protected activity, Sabin objected to OSHA's findings and requested a hearing before an ALJ. Later, Sabin withdrew his objection and request for a hearing. Applying 29 C.F.R. § 1978.111(c),[2] we noted, "When OSHA has found against a complainant and the complainant withdraws his objections to the findings, the result is a final order upholding the OSHA findings." *Sabin*, slip op. at 9. *See also Von Hubbard v. United Parcel Serv., Inc.*, ARB No. 06-022, ALJ No. 2005-STA-062 (Dec. 21, 2007); *Davis v. Fonda Kaye, Inc.*, ARB No. 05-152, ALJ No. 2005-STA-042 (Sept. 27, 2005). In *Sabin*, we contrasted the effect of withdrawing an appeal to an ALJ with withdrawing the underlying complaint to OSHA. "The voluntary dismissal of a complaint [to OSHA] can be granted without prejudice where there has been no finding on the merits." *Sabin*, slip op. at 9. Since Sabin withdrew his objections to OSHA's findings, they became the final decision of the Secretary of Labor.

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[2] Section 1978.111(c) provides:

> At any time before the findings or order become final, a party may withdraw his objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Administrative Review Board, United States Department of Labor. The judge or the Administrative Review Board, United States Department of Labor, as the case may be, shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn.

The ALJ "treated" Saporito's desired withdrawal of his complaint as if it were a withdrawal of his objection to OSHA's findings, which he concluded meant that the September 16, 2005 dismissal would become the final DOL determination. But this case arises under the environmental whistleblower laws. The environmental whistleblower laws have no counterpart to 29 C.F.R. § 1978.111(c), which is limited to whistleblower cases arising under the STAA. The general regulations governing the procedures to be followed before the Office of Administrative Law Judges (OALJ) are set forth at 29 C.F.R. Part 18, which provide, at § 18.1(a), "[t]he Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules . . . ." Since the rules of practice before the OALJ do not address the voluntary dismissal of complaints, the ARB has held that Rule 41 of the Federal Rules of Civil Procedure governs voluntary dismissals of environmental whistleblower cases. *Anderson v. DeKalb Plating Co.*, ARB No. 98-158, ALJ No. 1997-CER-001, slip op. at 2 (ARB July 27, 1999); *Nolder v. Raymond Kaiser Eng'rs, Inc.*, 1984-ERA-005, slip op. at 3 (Sec'y June 28, 1985) (applying Rule 41 to case arising under Energy Reorganization Act). Where, as here, the respondent has filed an answer to the complaint before the ALJ, Fed. R. Civ. P. 41(a)(2) applies. It provides:

> (2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Fed. R. Civ. P. 41(a)(2).

A respondent opposing dismissal without prejudice must show that it would suffer legal harm or prejudice if the case is dismissed without prejudice. *Anderson*, slip op. at 2; *Nolder*, slip op. at 4. "Plain legal prejudice, however, does not result simply when defendant faces the prospect of a second lawsuit or when plaintiff merely gains some tactical advantage." *Id.* (internal quotation and citation omitted). Factors the ARB will consider in determining whether a respondent will suffer legal prejudice include:

> [T]he respondent's effort expended in and the expense of trial preparation, the complainant's excessive delay and lack of diligence in prosecuting the action, insufficient explanation for the need to take a dismissal and the fact that respondent has filed a motion for summary judgment.

Anderson, slip op. at 2.

This case arises in the Eleventh Circuit. In *Potenberg v. Boston Scientific Corp.*, 252 F.3d 1253 (11th Cir. 2001), the Circuit noted that the district court "enjoys broad discretion in determining whether to allow a voluntary dismissal under Rule 41(a)(2)." 252 F.3d at 1255. The district court must "weigh the relevant equities and do justice

between the parties" by "attaching such conditions to the dismissal as are deemed appropriate." *Id.* at 1256. Although a defense motion for summary judgment was pending, the Circuit ruled that the district court did not abuse its discretion in allowing dismissal without prejudice, with court costs to be awarded to the defendant if the plaintiff refiled. *Id.* at 1260. On the other hand, in *McBride v. JLG Indus.*, 189 Fed. Appx. 876 (11th Cir. 2006), the Circuit held that the district court did not abuse its discretion when it dismissed the suit with prejudice. In *McBride*, the district court agreed with the defendant that "considerable time had been expended and expenses incurred"; many extensions had been granted for naught; the plaintiff moved to dismiss while the defendant's motions for summary judgment were pending "solely . . . to avoid an expected adverse ruling"; and the litigation was in a late stage. *Id.* at 878.

The parties' briefing to the ARB recognizes that FedEx Kinko's must show plain legal prejudice if Saporito's complaint is dismissed without prejudice. Applying the above-cited authorities to the record, we believe that showing has been made. FedEx Kinko's expended effort and expense in preparation of the case before the ALJ, including FedEx Kinko's filing an answer to Saporito's complaint, with affirmative defenses, affidavits regarding Saporito's alleged application for re-employment and a motion for an enlargement of time. Saporito delayed and lacked diligence in prosecuting his action, e.g., his delay in responding to the ALJ's Order to Show Cause why he should not dismiss Saporito's underlying complaint as untimely. Although previously advised to seek legal counsel, Saporito gave as his only reason for withdrawing his complaint that he was at an "economic disadvantage" because he could not compensate a lawyer to represent him. Finally, Saporito waited until the ALJ had scheduled the hearing on the merits, and had set and then enlarged the date for filing dispositive motions. This was at a late stage of the litigation, when he was facing a potential adverse ruling on the merits of his case.

CONCLUSION

Applying the principles of Rule 41(a)(2) and weighing the relative equities between the parties, we hold that Saporito's complaint should be and hereby is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge