In the Matter of:

DARIUS MOTARJEMI,

COMPLAINANT,

v.

METROPOLITAN COUNCIL
METRO TRANSIT DIVISION,

RESPONDENT.

ARB CASE NO. 08-135

ALJ CASE NO. 2008-NTS-002

DATE: September 17, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Darius Motarjemi, pro se, Richfield, Minnesota

For the Respondent:
Anthony Edwards, Esq., *Parker Rosen, LLC*, Minneapolis, Minnesota

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge;* Wayne C. Beyer, *Administrative Appeals Judge*, and Joanne Royce, *Administrative Appeals Judge*

ORDER OF REMAND

This case arises under the National Transit Systems Security Act of 2007 (NTSSA), 6 U.S.C.A. § 1142 (Thomson Reuters/West 2009). On February 22, 2008, Darius Motarjemi filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that the Metro Transit Division of Metropolitan Council, a subdivision of the State of Minnesota (Metro Transit), violated the NTSSA when it discharged him from employment.

OSHA denied the complaint. Motarjemi's attorney requested a hearing before an Administrative Law Judge (ALJ), and the parties initiated the discovery process in June 2008. In August 2008, Motarjemi contacted Metro Transit's attorney on two separate occasions, without his attorney's approval, to indicate his refusal to appear for a deposition. Motarjemi's attorney thereafter withdrew from the case.

On August 12, 2008, to assist Motarjemi with his search for a new lawyer, the ALJ provided him with a list of local attorneys to contact. On August 21, 2008, the ALJ issued an Order Compelling Deposition of Complainant. This order indicated that Motarjemi's failure to attend a deposition could result in "appropriate sanctions."

Metro Transit filed a Motion for Summary Decision (Motion) on August 25, 2008, seeking dismissal of Motarjemi's complaint. It argued that Motarjemi had not engaged in activity protected by the NTSSA prior to his discharge, and that Metro Transit discharged him for behavior unrelated to any alleged protected activity. Motarjemi did not respond to the Motion, but instead filed a "Condemnation of Attorney Referral by Judge Morgan Based on His Friendship" with one of the attorneys on the list the ALJ had provided to him.

On September 4, 2008, the ALJ issued an order captioned "Order Denying Complainant's Disqualification Motion, Complainant's Continuance Motion, Respondent's Motion to Strike and Granting Sanctions for Failure to Attend Deposition as Ordered and Ordering New Deposition." This order addressed several procedural matters then before the ALJ, but it did not discuss the Motion for Summary Decision. That same day, Motarjemi submitted a document to the Chief ALJ in the Office of Administrative Law Judges captioned "Complainant's Objection to Respondent's Mischievous Motions."

On September 8, 2008, the ALJ issued a Recommended Decision and Order Granting Respondent's Motion for Summary Decision (R. D. & O.). The ALJ noted that Motarjemi had not filed a response to the Motion, and concluded that "Respondent has carried its burden of showing that no issue of material fact exists as to protected activity and the legitimacy of the reasons for discharge."[1] Motarjemi appealed the ALJ's ruling to the Administrative Review Board (ARB).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the ARB.[2] The Board reviews an ALJ's recommended grant of summary judgment de novo.[3]

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1 R. D. & O. at 9.

2 *See* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

The standard for granting summary decision is set out at 29 C.F.R. § 18.40 (2010), and is essentially the same standard governing summary judgment in the federal courts.[4] Thus, the ALJ may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."[5] We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact.[6] A genuine issue of material fact is one, the resolution of which, "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[7]

"To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'"[8] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[9] 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."[10]

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[3] *Levi v. Anheuser Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006; ALJ Nos. 2006-SOX-037, -108, 2007-SOX-055, slip op. at 6 (ARB Apr. 30, 2008) (citing *Nixon v. Stewart & Stevenson Servs., Inc.*, ARB No. 05-066, ALJ No. 2005-SOX-001, slip op. at 6 (ARB Sept. 28, 2007)).

[4] Fed. R. Civ. P. 56.

[5] 29 C.F.R. § 18.40(d).

[6] *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002).

[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

[8] *Celotex*, 477 U.S. at 322.

[9] *Nixon*, ARB No. 05-066, slip op. at 6, citing *Celotex*, 477 U.S. at 322.

[10] 29 C.F.R. § 18.40(c).

DISCUSSION

In *Hooker v. Washington Savannah River Co.*,[11] the ARB adopted federal precedent requiring a judge to give a pro se complainant notice of the requirements for opposing a motion for summary judgment, and the right to file pleadings, affidavits, or other evidence in response to the motion. We held that the ALJ in that case erred in granting summary judgment on Hooker's constructive discharge and blacklisting claims because he failed to inform Hooker of "his right to file affidavits or 'other responsive materials' and did not warn him that failing to respond could mean that his case would be over."[12]

In this case, the record does not indicate that the ALJ informed Motarjemi, prior to issuance of the R. D. & O, of his right to oppose the Motion. Instead, the ALJ dismissed Motarjemi's complaint without informing him of the consequences for failing to respond to the Motion. This constitutes prejudicial error by the ALJ.[13]

We noted in *Hooker* that, when being notified of the requirements for responding to a motion for summary decision, a pro se litigant is entitled to "a form of notice sufficiently understandable to one in appellant's circumstances fairly to apprise him of what is required."[14] Accordingly, we direct the ALJ to provide Motarjemi with a notice containing: (1) the text of the rule governing summary decisions before ALJs (i.e., 29 C.F.R. § 18.40), and (2) a short and plain statement that factual assertions in Metro Transit's affidavits will be taken as true unless he contradicts Metro Transit with counter-affidavits or other documentary evidence.[15]

Motarjemi must be given an opportunity to respond to the Motion so that he may, as described above, set forth specific facts showing that there is a genuine issue of fact for a hearing. Although we express no opinion on the merits of Motarjemi's claim, we

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[11] ARB No. 03-036, ALJ No. 2001-ERA-016 (ARB Aug. 26, 2004).

[12] *Id.*, slip op. at 9.

[13] *See, e.g., Galinsky v. Bank of Am., Corp*., ARB No. 08-014, ALJ No. 2007-SOX-076, slip op. at 3 (ARB Jan. 13, 2010).

[14] *Hooker*, ARB No. 03-036, slip op. at 8, citing *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975) (citing *Hudson v. Hardy*, 412 F.2d 1091, 1094 (1968)).

[15] *See, e.g., Timms v. Frank*, 953 F.2d 281, 285 (7th Cir 1992)("a short and plain statement in ordinary English" is appropriate because "the need to answer a summary judgment motion with counter-affidavits is contrary to lay intuition.").

REVERSE the ALJ's Recommended Decision and Order Granting Respondent's Motion for Summary Decision and **REMAND** the case for further proceedings consistent with this opinion.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge