U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 10 January 2006

CASE NO.: 2006 SOX 11

In the Matter of

MARC H. GOODMAN
Complainant

v.

DECISIVE ANALYTICS CORP. &
LYNN AMBUEL
Respondents

Appearances: Mr. R. Scott Oswald, Attorney
Mr. Nicholas Woodfield, Attorney
For the Complainant

Mr. Douglas C. Herbert, Attorney
For the Respondents

Before: Richard T. Stansell-Gamm
Administrative Law Judge

APPROVAL OF SECOND AMENDED COMPLAINANT
DENIAL OF MOTION TO STAY CONSIDERATION
APPROVAL OF MOTION FOR SUMMARY DECISION &
DISMISSAL OF SECOND AMENDED COMPLAINT

Pursuant to a Notice of Hearing, dated November 7, 2005, I set a date of January 9, 2006 for this case in Washington, D.C to conduct a hearing under Section 806 of the Sarbanes-Oxley Act of 2002, (Public Law 107-204), 18 U.S.C.§ 1514A, ("SOX" and "Act") as implemented by 29 C.F.R. Part 1980. Due to pending motions, I continued the proceedings on December 2, 2005. Presently, I have three separate motions to address. First, on October 31, 2005, the Complainant, through counsel, filed a motion for leave to file a second amended complainant. On December 23, 2005, the Respondents, through counsel, filed an opposition to a second amended complaint.[1] Second, on November 29, 2005, Respondents, through counsel, filed a Motion for Summary Decision or Dismissal. On December 15, 2005, the Complainant filed an

[1]Since counsel for the Respondents, Mr. Herbert, did not enter an appearance on their behalf until November 29, 2005, I directed Complainant's counsel to serve a copy of the second amended complaint on Mr. Herbert. Mr. Herbert was provided an e-mail copy on December 5, 2005 and formally served with the second amended complaint on December 29, 2005.

opposition to such a disposition. Third, also on December 15, 2005, the Complainant filed a Motion to Stay Consideration of Respondent's Motion for Summary Decision. On December 23, 2005, Respondents filed an opposition to a stay of a determination concerning the summary decision.

Second Amended Complainant

Background

On May 20, 2005, the Complainant filed a SOX employment discrimination complaint. Subsequently, on June 30, 2005, as a matter of right under 29 C.F.R § 18.5 (e), Mr. Goodman filed a First Amended Complaint which was investigated by the Regional Administrator, Occupational Safety and Health Administration ("OSHA"). On September 30, 2005, the Regional Administrator dismissed the complaint because Mr. Goodman failed to established that a SOX protected activity contributed to his employment termination. On October 19, 2005, Mr. Goodman filed a timely objection with the Office of Administrative Law Judges to the Regional Administrator's findings.

Motion to File Second Amended Complaint

In his October 31, 2005 Motion to File Second Amended Complaint, Complainant's counsel, Mr. Oswald, seeks to add one paragraph alleging the Respondent, Decisive Analytics Corp., engaged in fraudulent billing practices by charging customers for employment benefits associated with full-time employment for employees who only worked part-time.[2] According to Mr. Goodman, this practice permitted the Respondent to overcharge for employee costs, thereby increasing the company's profitability. The Complainant asserts the additional allegation is reasonably within the scope of the original complaint. The Respondent will not suffer any prejudice since it has been aware of Mr. Goodman's complaint since May 2005 and has not yet initiated formal discovery. In contrast, the Complainant would be severely prejudiced if he is precluded from presenting all factual allegations in this proceeding since the statute of limitations has run for filing a new SOX complaint against the Respondents.

Opposition

In his December 23, 2005 opposition to the Second Amended Complaint, counsel for the Respondents, Mr. Herbert, presents two reasons the amendment should not be permitted. First, the new paragraph 16 raises new factual allegations that were not presented to OSHA for investigation. As a result, the allegation is untimely. Second, the proposed amendment would not survive a motion to dismiss since it does not state a viable claim. Specifically, the new allegation does not indicate Mr. Goodman ever reported the purported fraud to anyone, that he was terminated due to any complaints he may have made about the practice, or that he reasonably believed the practice violated fraud laws referenced by the Act.

[2]Paragraph 16 of the Second Amended Complaint.

Discussion

The provisions of 20 C.F.R. § 18.5 (e) address two situations in which a complaint may be amended. Initially, a complainant may amend a complaint once as a matter of right, "prior to the answer." Mr. Goodman already exercised that right shortly after he filed his initial complaint with the Regional Administrator.

Subsequently, under additional provisions of 29 C.F.R. § 18.5 (e), an administrative law judge may permit an amendment to a complaint or pleading to facilitate a determination of a controversy on the merits, provided prejudice to the parties is avoided and amendment is reasonably within the scope of the original complaint. Through numerous interpretations and applications of a similar provision in the Federal Rules of Civil Procedure, FED. R. CIV. P. 15, courts have provided several guiding principles and precedents concerning the parameters of an amended complaint.

First, and significantly, the U.S. Supreme Court, citing FED. R. CIV. P. 15 (a), has declared amendments are to be "freely granted." *Foman v. Davis* 371 U.S. 178, 182 (1962). Justice Goldberg explained that pleading technicalities should not be controlling; instead, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.* At the same time, the Court added some boundaries to a lower court's discretion in granting an amendment. Undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, futility of the amendment, or undue prejudice to the opposing party, may warrant denying an amendment. *Id.*

The first couple of the court's stated caveats to the liberal granting of an amended complaint are not applicable in my consideration of Mr. Goodman's amended complaint. Clearly, undue delay, bad faith, and dilatory motive do not appear to be factors in this case.

Arguably, the presentation of a second amendment to the complaint raises the prospect that Mr. Goodman is repeatedly failing to cure deficiencies through prior amendments. However, the Respondents have not based an objection on that grounds and circumstances have not yet reached that requisite level of inefficiency.

Turning to the Respondents' argument that the amendment is futile because it does not state a viable claim, I first note that Mr. Goodman's First Amended Complaint contained both specific and broad allegations of fraudulent billing practices. Specifically, Mr. Goodman alleged that he had presented his concerns to Mr. Donnellon in the late summer and fall of 2004 about his supervisor's management practices and "fraudulent time charging activities." These billing practices included charging time to accounts for work Mr. Goodman did not perform and exaggerating the number of hours. According to Mr. Goodman, he also informed the company's chief financial officer that his supervisor insisted that he maintain factually inaccurate time records. In general terms, Mr. Goodman states that he subsequently discussed with the company's contracting officer the purported fraud being perpetrated on the Respondent's clients.

Standing alone, the additional paragraph does not state a viable claim and merely presents an additional allegation of billing fraud. However, the paragraph must be read within the context of the entire First Amended Complaint. In that light, the new allegation introduced in paragraph 16 of fraudulently over-charging for the employment expenses for part-time employees also relates to the broad allegation of billing fraud perpetrated against the company's customers. As a result, I find the additional paragraph may have viability since it reasonably falls within the scope of the First Amended Complaint.

My determination that the paragraph in the amendment falls within the scope of the First Amended Complaint also answers the Respondents' un-timeliness objection to the amendment. A central theme of Mr. Goodman's timely filed SOX discrimination complaint is that the Respondents' terminated his employment due the concerns he raised about fraudulent billing practices to various supervisors and officers of the company. While most of the specific allegations relate directly to Mr. Goodman's time accounting, his First Amended Complaint included an assertion that he presented a broad assertion of billing practice fraud to the company's contracting officer. The proposed additional paragraph may relate to that timely presented broad assertion.

The remaining basis for denial of an amendment complaint, undue prejudice to the opposing parties, requires closer examination. In upholding denials of amendments of complaints, courts have found sufficient prejudice to a party when: a) the amended complaint essentially eliminated a counterclaim, *Underwriters at Interest on Cover Note JHB92M10582079 v. Nautronix, Ltd.,*7 F.3d 480 (5th Cir. 1996); b) plaintiff had ample time to respond to the defendant's motion for summary judgment, *Garner v. Kinnear Mfg. Co.,* 37 F.3d 263 (1994); and, c) the amendment was presented from one to four years after commencement of the proceedings and would have required new discovery and litigation, *Johnson v. Methodist Medical Center of Illinois,* 10 F.3d 1300 (7th Cir. 1993) and *Little v. Liquid Air Corp.,* 952 F.2d 841 (5th Cir. 1992).[3]

Denial based on prejudice to the opposing party has also been upheld when the plaintiff sought to add "a fact of which it had been aware since before it filed its original complaint," coupled with a delay of over a year from the original complaint and eleven months after the first amended complaint. *In re Southmark Corp.* 88 F.3d 311, 316 (5th Cir. 1996). Similarly, amendment of a complaint to state a new claim unrelated to the facts in the original complaint presented three weeks prior to trial is not appropriate. *Campbell v. Ingersoll Milling Mach. Co.,* 893 F.2d 925, 927 (7th Cir), *cert. denied,* 498 U.S. 844 (1990). The court emphasized that nothing in the record reasonably would have given the defendant any indication that it would have to defend against the new claim and stated specifically:

> Eleventh hour additions of new legal and factual theories inevitably require new rounds of discovery and additional legal research. This is bound to produce delays that burden not only the parties to the litigation but also the judicial system

[3]Most references obtained from 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 15.6 (1997).

and other litigants. A district court judge is entitled, in such circumstances, to refuse to allow a plaintiff's amendment. *Id.*[4]

In other words, when coupled with an extensive passage of time between the original and amended complaints, protection of other litigants usually becomes a basis for denial of an amended complaint if the facts in the amended complaint take the respondent by surprise and require the party "to investigate a claim of which it was not already cognizant." *Island Creek Coal Co.,* 832 F.2d 274, 280 (4th Cir. 1987). Title 29 C.F.R. § 18.5 (3) addresses these concerns by requiring the amended complaint to be reasonably within the scope of the original complaint.

With these principles in mind, and even though Mr. Goodman may have been aware of the details alleged in paragraph 16 when he first filed his initial complaint and First Amended Complaint, I believe at this stage of the proceeding the Respondents suffer little actual harm in terms of prejudicial delay by permitting an additional amendment. Notably, since I have already continued the hearing pending resolution of the Motion for Summary Decision, the parties have not initiated discovery. Additionally, having determined the additional paragraph reasonably falls with the scope of the present complaint, I conclude the Respondents' had previous timely notice that Mr. Goodman alleged the company was engaged in fraudulent billing relating to its employees.

Accordingly, for the reasons stated above, I **APPROVE** the Complainant's Motion to file the Second Amended Complaint. The litigation in this case will now proceed on the basis of the Second Amended Complaint.

Summary Decision (Parties' Positions)

While I will obviously have to address the Motion to Defer Consideration of the Motion for Summary Decision or Dismissal prior to adjudicating the motion, a review of the parties' positions concerning a summary decision at this point provides a important foundation upon which to address the deferral motion.

Respondent's Motion for Summary Decision

Mr. Goodman's complaint should be dismissed due to the lack of subject matter jurisdiction because he was not a covered employee under SOX. The Act protects only employees of publicly traded companies and companies required to file with the Securities Exchange Commission ("SEC"). Mr. Goodman was employed by Decisive Analytics Corporation ("DAC") which is a private company and not required to file reports with the SEC.

[4]In *McGregor v. Louisiana State University,* 3 F.3d 850, 864 (5th Cir. 1993) the court held that an amendment which states new and distinct conduct not found in the original complaint does not relate back to the original complaint. In a manner similar to the *Campbell* court discussed above, the court in the *McGregor* case was considering whether an additional claim contained in the amended complaint was not time barred because it related back to the original complaint or claim. Because the facts and circumstances set out in the original claim did not reasonably apprise the defendant of the new due process claim set forth in the amended complaint, the appellate court upheld the district court's finding that the amended complaint did not relate back to the original complaint under FED. CIV. R. P. 15 (c) (2) and was thus time barred. *Id.* at 863-864.

Mr. Goodman's generalized representation that DAC worked as a contractor for publicly traded companies also does not confer SOX whistleblower protection. In general terms, the Act's language concerning contractors, subcontractors, and agents of publicly traded companies does not draw in DAC as an employer subject to the SOX mandates. The Act prohibits publicly traded companies and, in part, any contractor, subcontract, or agent of such company from taking an adverse employment action against an employee of the publicly traded company due to the employee's SOX protected activity. This provision simply identifies the entities that may not take action against an employee on behalf of the publicly traded company. Significantly, Mr. Goodman has not alleged that DAC was acting on behalf of any publicly traded company in making its personnel decisions regarding him. The Act's language does not extend SOX whistleblower protection to the employees of the contractor, subcontractor, and agent. In other words, that provision does not change the requirement that the individual seeking SOX whistleblower protection must have been employed by a publicly traded company. Any other interpretation would extend SOX employee protection far beyond the applicability envisioned by Congress since any private business conducting any contractual transaction with a publicly traded company would be subject to SOX employee protection provisions.

Further, regardless of the interpretation of the statutory language, Mr. Goodman's complaint nevertheless fails because none of his allegations related to work or transactions with publicly traded companies. The sole project assigned to Mr. Goodman involved contract services development for a non-publicly traded firm. As a result, his fraud allegations concerning his hourly billing had no relationship to a publicly traded company. Mr. Goodman's other allegations concerning another employee has a similar jurisdictional defect since none of the work by the other employee involved publicly traded companies.

Complainant's Opposition

The Respondents' Motion for Summary Decision should be dismissed on procedural and substantive grounds. Procedurally, the Respondents are precluded from raising the jurisdiction motion because they did not submit a timely objection to the Secretary's findings issued by the Regional Administrator. As part of his findings, the Regional Administrator determined that DAC was an employer subject to SOX since it was a publicly traded company or required to file reports with the SEC. The Regional Administrator advised the parties that they had 30 days to object to the findings and that absent a timely objection the findings would become final. Since the Respondents did not appeal the findings concerning DAC's designation as an employer subject to SOX, that finding is final and not subject to judicial review.

Substantively, a plain reading of the applicable provision of the Act establishes the Mr. Goodman is an employee protected by SOX since he worked for as a subcontractor of a publicly traded company. As at least one administrative law judge determined, the remedial purpose of the statute to protect investors is advanced by an interpretation of the statutory language that extends SOX whistleblower protection to an employee of a private subsidiary of a publicly traded company. In the spirit of SOX, Mr. Goodman believed DAC was defrauding investors and the publicly traded companies for which it contracted and he complained about those practices. A narrow interpretation of SOX to preclude subject matter jurisdiction in his case

would be contrary to the purpose of SOX and discourage employees from raising good faith concerns about company fraudulent practices.

Stay of Consideration of Motion for Summary Decision

Motion to Stay Consideration

The provisions of FED. R. CIV. P. 56 (f) permit a stay of consideration of a motion if the opposing party demonstrates that it does not possess sufficient information due to the absence of discovery to present a factual defense by affidavit to the motion. According to his counsel, Mr. Goodman has not yet had the opportunity to depose key witnesses, including the management and supervisors of DAC, about the company's billing practices and the identification of its publicly traded companies for whom DAC acts as a subcontractor and contractor. Additionally, the interrogatory answers have been sparse and generally consist of objections to the questions. Adjudication of the Motion for Summary Decision in the absence of effective discovery would severely prejudice Mr. Goodman's ability to respond to defend against dismissal of his complaint.

Opposition

The Motion to Stay Consideration should be denied. The Respondents' Motion for Summary Decision is based on a lack of subject matter jurisdiction because DAC is not a publicly traded company and has not acted on behalf of a publicly traded company concerning Mr. Goodman. In his Motion to Stay Consideration to conduct discovery, Mr. Goodman has not pointed to any essential evidence he expects to develop that will demonstrate DAC is a publicly traded company or that DAC had taken an adverse action against an employee of a publicly traded company. His requested areas of discovery focus more on the details of his fraud complaints and do not relate to the subject matter jurisdiction issue presented in the Motion for Summary Decision. As a result, Mr. Goodman has failed to present sufficient justification to delay consideration of the summary decision motion. Further, permitting discovery prior to the consideration of a potentially dispositive motion would be a waste of resources.

Discussion

As set out below, a Motion for Summary Decision based on lack of subject matter jurisdiction may involve either a facial or factual inquiry. The motion to stay consideration might have some merit if resolution of the present Motion for Summary Decision required a factual inquiry and consideration of the parties' respective supporting affidavits. However, the central issue concerning subject matter jurisdiction in Mr. Goodman's case is a legal determination based on a facial consideration of the Second Amended Complaint. As a result, a factual inquiry on the sufficiency of the Second Amended Complaint is not necessary and additional discovery to defend against a Motion for Summary Decision supported by affidavits is not warranted. Accordingly, the Motion to Stay Consideration of the Motion for Summary Decision is **DENIED**.

Summary Decision (Adjudication)

Addressing first the Complainant's objection based on procedural grounds, Mr. Goodman's counsel has correctly asserted that the Regional Administrator's findings become final "[i]f if no timely objection is filed with respect to either the findings or the preliminary order," 29 C.F.R. § 1980.106 (b) (2). However, the Complainant's timely appeal of the Regional Administrator's determinations provided the requisite "timely objection" such that none of the Regional Administrator's findings became final. Other than the portion of a preliminary order requiring reinstatement, a Regional Administrator's findings and preliminary order are not effective if an objection and hearing request have been timely filed, 29 C.F.R. §§ 1980.105 (c) and 106 (b) (1). Since Mr. Goodman's timely objection transferred his complaint to the Office of Administrative Law Judges for a *de novo* determination on the merits under 29 C.F.R. §1980.107 (b), the Respondents are not bound by the Regional Administrator's prior determinations.[5] Accordingly, the Complainant's procedural objection to the Respondents' Motion for Summary Judgment is overruled.

Turning to the central issue – subject matter jurisdiction, I note that 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, as made applicable to SOX cases by 29 C.F.R. § 1980.100 (b), does not contain a section pertaining to a motion to dismiss. However, 29 C.F.R. § 18.1 (a) indicates that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. In turn, FED. R. CIV. P 12 (b) (1), addresses a motion to dismiss for lack of subject matter jurisdiction. The courts recognize two approaches in considering a 12 (b) (1) motion.[6] The first consideration of a 12 (b) (1) motion is whether the pleading, or complaint, on its face is sufficient. In reviewing a "facial" motion to dismiss, I consider the allegations in the complaint as true. For the reasons stated below, I conclude that Mr. Goodman's Second Amended Complaint is insufficient on its face to establish subject matter jurisdiction under SOX.[7]

Upon initial consideration of the complaint, I note that Mr. Goodman does not claim to be an employee of a publicly traded company or a company required to file with the SEC. His complaint contains no assertions that DAC is a publicly traded company or is required to file with the SEC. Similarly, Mr. Goodman also does not allege that DAC undertook its adverse personnel actions involving Mr. Goodman on behalf of any publicly traded company. He makes no assertion that DAC interaction with publicly traded companies went beyond providing engineering consulting services under contract to publicly traded clients.

Instead, to establish jurisdiction, in paragraph two of his complaint, Mr. Goodman alleges: "DAC is a contractor, subcontractor, or agent of various publicly traded companies,

[5]Additionally, as the prevailing party before the Regional Administrator on the ultimate issue of discrimination, the Respondents were not obligated to appeal collateral adverse determinations.

[6]*See Ohio National Life Insurance Co. v. United States*, 922 F.2d 320 (6th Cir. 1990).

[7]Based on my determination, I need not address the second consideration under 12 (b) (1) involving a factual consideration of the complaint. In this "factual" analysis, no presumption of truthfulness applies to the allegations in the complaint. Instead, a judge may rely on affidavits and other documents submitted in support of the motion.

including The Titan Corporation, Raytheon Company, Lockheed Martin Corporation, and The Boeing Company."[8] Also contained in the complaint are indications that DAC is a system engineering company and its employees, including Mr. Goodman, perform consulting services for its clients, which include publicly traded companies. Thus, as set out in the complaint, and for the purposes of this motion, Mr. Goodman was an employee of a company providing engineering consulting services under contract with publicly traded companies. Within that context, Mr. Goodman's complaint of SOX discrimination survives a jurisdictional challenge only if DAC's contracts with publicly traded companies for engineering consulting services, which may technically permit its designation as a contractor or subcontractor of a publicly traded company,[9] confer SOX whistleblower protection upon DAC employees.

According to 18 U.S.C. § 1514A (a), no publicly traded company, or a company required to file with the SEC, "or any officer, employee, contractor, subcontractor of such company" may discriminate against an employee for engaging in a SOX protected activity. As the parties' briefs amply demonstrate, administrative law judges have reached different conclusions as to the jurisdictional breadth of this SOX subject matter jurisdiction provision. However, my respective colleague's diverse interpretations of this statutory language do not have precedence value; and, to date, no definitive appellate interpretation has been established.[10]

I am mindful of the remedial nature of the SOX employee protection provisions and the public interest in corporate integrity that was relied upon by some administrative law judges to find jurisdiction extended down to an employee of a private, wholly owned subsidiary of a publicly traded company.[11] Nevertheless, I am guided in my interpretation by the caption Congress chose for 18 U.S.C. § 1514 A (a) – "WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES." Based on that caption, I believe the term "employee" in the

[8]Interestingly, Mr. Goodman did not include these specified publicly traded companies as named parties in his complaint.

[9]Since I dispose of the motion on other grounds, I have not addressed the legal sufficiency of this premise, whether a private company's contract for consulting services with a publicly traded company renders it a "contractor" or "subcontractor" of that publicly traded company for the purposes of the SOX.

[10]One case cited by the Respondent, *Minkina v. Affiliated Physicians Group,* No. 2005 SOX 19 (ALJ Feb. 22, 2005), *appeal dismissed,* (ARB July 29, 2005) was relied upon by federal district court in *Brady v. Calyon Securities,* 2005 WL 3005808 (S.D.N.Y) to find the absence of SOX coverage for an employee of an agency that conducted periodic work on behalf of a publicly traded company. However, I note that the ARB dismissed the appellate appeal in *Minkina* as untimely and consequently did not reach the merits of the administrative law judge's decision.

[11]Several administrative law judges have indirectly extended SOX whistleblower protection to employees of private companies by determining that a parent company subject to SOX may be held liable under the Act for violations of the SOX whistleblower provision by its wholly owned subsidiaries. *See Gonzales v. Colonial Bank & The Colonial Bancgroup, Inc*., 2004-SOX-39 (ALJ Aug. 20, 2004); *see also Morefield v. Exelon Services, Inc. and Exelon Corp.*, 2004-SOX-2 (ALJ Jan. 28, 2004); *see also Klopenstein v. PCC Flow Technologies Holdings, Inc. and Allen Parrott*, 2004-SOX-11 (ALJ July 6, 2004). Notably, the judges have found that jurisdiction under SOX only extends to the parent company if the parent company is also named in the complaint. *See Powers v. Pinnacle Airlines, Inc.*, 2003-SOX-18 (ALJ March 5, 2003); *see also Gonzales*, 2004-SOX-39 (holding that publicly traded parent company could be held liable for the acts of its subsidiary after parent company was added as a Respondent and Complainant showed sufficient commonality of management and purpose).

employment discrimination prohibition refers to an employee of a publicly traded company. In that light, the terms "contractor" and "subcontractor" in the provision reference two of various entities of a publicly traded company that may not adversely affect the terms and conditions of an employee of a publicly traded company. Under my interpretation, employees of private contractors and subcontractors of publicly traded companies are not afforded SOX whistleblower protection. Any broader interpretation means every non-publicly traded company becomes subject to SOX if it engages in any contractual relationship with a publicly traded company. At present, the caption and language of the SOX employee protection provision does not extend its jurisdictional reach that far.

If taken as true, the allegations of Mr. Goodman's complaint only establish that he was an employee of a private company providing engineering consulting services to publicly traded companies. Under that business arrangement, Mr. Goodman was not an employee of a publicly traded company or a company required to file with the SEC. As result, Mr. Goodman was not an employee entitled to SOX whistleblower protection under 18 U.S.C.§1514 A (a) and he has failed to establish subject matter jurisdiction. Accordingly, the Motion for Summary Decision must be approved and Mr. Goodman's Second Amended Complaint must be dismissed.

ORDER

Accordingly, the Respondents' Motion for Summary Decision is **APPROVED**. The Second Amended Complaint of Mr. Marc H. Goodman is **DISMISSED**.[12]

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: January 10, 2006
Washington, D.C.

[12]I have held a November 28, 2005 request from Complainant's counsel for a subpoena of Western DataComm documents pending resolution of these motions. In light of the dismissal, I will not issue the subpoena.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within **ten (10) business days** of the date of the administrative law judge's decision. See 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).