U.S. Department of Labor

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Issue Date: 29 March 2005

CASE NOS.: 2005-SOX-00033
2005-SOX-00034

In the Matters of

SCOTT BECHTEL,
WIL JACQUES,
Complainants,

v.

COMPETITIVE TECHNOLOGIES, INC.,
Respondent.

ORDER DENYING MOTION FOR STAY
OF OSHA'S PRELIMINARY ORDER OF REINSTATEMENT

This case arises out of complaints of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, title VIII of the Sarbanes-Oxley Act of 2002, ("the Act") enacted on July 30, 2002. Codified at 18 U.S.C. § 1514A et seq., the Act provides the right to bring a "civil action to protect against retaliation in fraud cases" under section 806. Further, Congress has stated that the Act will be governed by 49 U.S.C. § 42121(b), which sets forth the procedural requirements for similar whistleblowing cases brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. 18 U.S.C. §1514A(b)(2)(B). ("AIR21").

The Act allows employees who "provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [certain provisions of the Act], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders..." to bring a civil action to protect against retaliation for their actions. 18 U.S.C. §1514A(a)(1). The Act extends such protection to employees of companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l)["SEA of 1934"] or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 780(d))". 18 U.S.C. § 1514A(a).

On September 23, 2003, and on September 25, 2003, respectively, Scott Bechtel and Wil Jacques ("Complainants", hereinafter) filed complaints with the Occupational Safety and Health Administration of the U.S. Department of Labor ("OSHA"), alleging that their employer, Competitive Technologies, Inc., ("Respondent", hereinafter) retaliated against them in violation of the Act. On February 2, 2005, OSHA issued a determination that found "reasonable cause to

believe that Respondent's discharge of Complainants violated 18 U.S.C. § 1514A." (See, OSHA determination letter of February 2, 2005). As the result of its determination, OSHA ordered Respondent to reinstate Complainants to their positions, with full pay and benefits, and additionally ordered Respondent to compensate Complainants for losses attributed to their termination, as well as to take certain other actions, cited in full herein, below. On February 11, 2005, Respondent filed a timely notice of objection to OSHA's findings with the Office of Administrative Law Judges for the U.S. Department of Labor ("OALJ"), and requested a hearing.

The case was subsequently assigned to me, and by Order issued February 16, 2005, I denied Respondent's request for venue in Washington, D.C. On February 17, 2005, I issued a Notice of Hearing and Pre-Hearing Order in which I scheduled a hearing in the matter for March 29, 2005 in Fairfield, Connecticut. I also ordered the parties to participate in an informal telephone conference, which was held on March 2, 2005, the substance of which is summarized in my Order of March 3, 2005.

Counsel for Complainant Jacques entered his Notice of Appearance on February 28, 2005. On March 1, 2005, Complainant Jacques requested a brief continuance of the hearing. Complainant Bechtel did not object, but Respondent did. By letter dated March 17, 2005, Respondent withdrew its objection to continuance, and the hearing is presently scheduled to commence on May 16, 2005.

On March 3, 2005[1], Respondent moved to Stay OSHA's order to reinstate Complainants.[2] Complainant Jacques filed his opposition to the motion on March 9, 2005, and Complainant Bechtel filed his opposition on March 14, 2005.

I. OSHA's Preliminary Order

OSHA's findings and preliminary order of February 2, 2005, state in pertinent part:

> Upon receipt of these Findings, Respondent shall reinstate Complainants to the same positions and provide them the salaries and all other benefits commensurate with the position of vice president.
>
> Respondent shall pay Complainant Bechtel back wages of $192,100 and Complainant Jacques back wages of $166,857 which incorporates a deduction for Jacques [sic] interim earnings. Bechtel had no interim earnings.
>
> Respondent shall pay Complainant Bechtel $95,500 and Complainant Jacques $193,978 for loss of stock options.

[1] With my consent, Respondent filed its motion by e-mail on this date, and the motion was printed and docketed; however, the voluminous attachments thereto were docketed upon their receipt by mail on March 8, 2005.

[2] Complainants have not sought sanctions for Respondent's failure to comply with OSHA's preliminary Order to reinstate them to their employment.

Respondent shall pay Complainant Bechtel compensatory damages in the amount of $12,036 for legal expenses connected to this investigation, $23,213 for relocation expense, $19,575 for travel reimbursements, $18,981 for out of pocket medical expenses and medical coverage, $7,198 for counseling charges due to stress of termination and $911 for expenses in connection with a job search.

Respondent shall pay Complainant Jacques compensatory damages in the amount of $30,000 each for damage to reputation and career, severely compromised ability to find work, and mental suffering.

Respondent shall expunge any adverse references from Complainant Bechtel [sic] and Jacques [sic] personnel records relating to the discharge and not make any negative references relating to the discharge in any future request for employment references. Respondent shall post this letter of findings and order in a conspicuous place(s) in and about its premises where employee notices are customarily posted for a period of no less than sixty (60) days.

II. Summary of the Contentions of the Parties

A. Respondent

Respondent asserts that OALJ has jurisdiction to consider a motion for a Stay of OSHA's preliminary order of reinstatement under the regulations promulgated by the Department of Labor ("DOL"), and argues that circumstances in this matter meet the balancing test discussed by DOL in commentary to its regulations pertaining to investigations under the Act. See, 69 Fed. Reg. 52103 (Aug. 24, 2004).

In support of its motion to stay OSHA's order to reinstate the Complainants, Respondent argues that it has acquired evidence of misconduct by Complainants that allegedly occurred before and after their tenure of employment that would have led to their termination. In addition, Respondent contends that Complainants, particularly Complainant Bechtel, demonstrate animosity beyond that anticipated by the inherent friction of litigation so as to make reinstatement difficult, especially in consideration of the small size of Respondent's operation and workforce. Respondent further argues that reinstatement of Complainants would interfere with Respondent's discovery efforts and trial preparation.

B. Complainant Bechtel

Complainant contends that OALJ does not have jurisdiction to order a stay of a preliminary order of reinstatement under the Act because the plain language of the Act mandates reinstatement, notwithstanding the regulatory grant to file a request for stay. If jurisdiction for granting a stay is found, Complainant argues that Respondent has failed to meet the criteria for equitable relief.

C. Complainant Jacques

Complainant contends that Respondent has failed to provide grounds within the regulatory scheme that support a grant of Stay of reinstatement. Complainant argues that Respondent has failed to establish that he presents a "security risk", which he asserts is the one regulatory exception to the immediate effectiveness of a preliminary order of reinstatement under 29 C.F.R. § 1980.105(c). Complainant contends that Respondent's assertion that due process, "after acquired evidence", and interference with trial preparation support a grant of a Stay of the preliminary order of reinstatement are baseless in law and in fact.

III. Applicable Statutes and Regulations

A. AIR21 49 U.S.C. § 42121(b)(2)

Section 42121(b) of AIR21 sets the procedure for filing complaints of discrimination under AIR21 with the U.S. Department of Labor [OSHA]. Section 42121(b)(2) prescribes the conduct of investigations of such complaints:

> **In general**-Not later than 60 days after the date of receipt of a complaint filed under [section 42121(b)(1)] and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses , the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the persons alleged to have committed a violation of [discrimination] of the Secretary's findings with a preliminary order providing relief prescribed by [AIR21]. Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

B. 18 U.S.C. 1514A(c) of the Act

Section 1514A(c) provides:

(1) IN GENERAL-an employee prevailing in any action under [an enforcement action wherein he filed a complaint of discrimination under the Act with the Secretary of Labor] shall be entitled to all relief necessary to make the employee whole.
(2) COMPENSATORY DAMAGES-Relief for any action under paragraph (1) shall include:

(A) reinstatement with the same seniority status that the employee would have had but for the discrimination;
(B) the amount of back pay, with interest; and
(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

18 U.S.C. 1514A (c)

C. Prevailing AIR21 Regulations

The currently applicable regulations pertaining to discrimination under AIR21, are set forth at 29.C.F.R. Part 1979. 68 Fed. Reg. 14100-01 (March 21, 2003). The regulations provide at 29 C.F.R. § 1979.105(a)(1) that:

> If the Assistant Secretary [OSHA] concludes that there is reasonable cause to believe that a violation has occurred, he or she will accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will include, where appropriate, a requirement that the named person abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; and payment of compensatory damages. Where the named person establishes that the complainant is a security risk (whether or not the information is obtained after the complainant's discharge) a preliminary order of reinstatement would not be appropriate. At the complainant's request the order shall also assess against the named person the complainant's costs and expenses (including attorney's and expert witness fees) reasonably incurred in connection with filing the complaint…
>
> (c) The findings and the preliminary order shall be effective 30 days after receipt by the named person …unless an objection and a request for a hearing has been filed as provided at § 1979.106. However, the portion of any preliminary order requiring reinstatement shall be effective immediately upon receipt of the findings and preliminary order.

The regulations further provide at section 1979.106(b)(1) that:

> If a timely objection is filed, all provisions of the preliminary order shall be stayed, except for the portion requiring preliminary reinstatement. The portion of the preliminary order requiring reinstatement shall be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections to the order.

D. Prevailing Sarbanes-Oxley Act OSHA Regulations

On August 24, 2004, OSHA published final regulations prescribing the procedures for handling complaints of discrimination under the Act . 69 Fed. Reg. 52104. The regulations are found at 29 C.F.R. Part 1980. Section 1980.105, **Issuance of findings and preliminary orders**, pertains to the instant issue and states:

> (a) After considering all the relevant information collected during the investigation, the Assistant Secretary [OSHA] shall issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act.
>
> (1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she shall accompany the findings with a preliminary order providing relief to the complainant. The preliminary order shall include all relief necessary to make the employee whole, including, where appropriate: reinstatement with the same seniority status that the employee would have had but for the discrimination; back pay with interest; and compensation for special damages sustained as a result of discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees. Where the named person establishes that the complainant is a security risk (whether or not the information is obtained after the complainant's discharge) a preliminary order of reinstatement would not be appropriate.
>
> (2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding…
>
> (b) The findings and preliminary order will be effective 30 days after receipt by the named person [Respondent], unless an objection and a request for a hearing has been filed as provided at § 1980.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon receipt of the findings and preliminary order.

The regulations further provide at section 1980.106, objections to the findings and the preliminary order and request for a hearing, that:

> If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring reinstatement, which shall not be automatically stayed. The portion of the preliminary order requiring reinstatement will be effective immediately upon the named person's receipt of the findings and preliminary order. The named person may file a motion with OALJ for a stay of the Assistant Secretary's preliminary order of reinstatement.

29 C.F.R. § 1980.106(b)(1).

IV. Discussion

A. OALJ Has Jurisdiction to Entertain a Motion for a Stay of a Preliminary Order of Reinstatement

Complainant Bechtel argues that the prevailing regulation that allows parties to request a stay of a preliminary order of reinstatement is inconsistent with the statutory mandate of AIR21that "the filing of …objections shall not operate to stay any reinstatement remedy contained in the preliminary order". 49 U.S.C. § 42121(b)(2)(A). Complainant further argues "[t]he use of the term "shall" indicates that the statute itself [referring to the Sarbanes Oxley Act] does not provide jurisdiction to the OALJ to order a stay of the preliminary order of reinstatement". See, Brief of Complainant Bechtel at p. 10. Complainant rather simplistically concludes "[w]hen there is a conflict between a regulation and a statute, the statute trumps". Id.

I cannot agree with Complainant that the cited statutory language of the Act refers to the implementation of a preliminary order of reinstatement, because it falls in a section of the Act under the heading of "Remedies", which enumerates the types of relief to which an individual who prevails in his complaint may be entitled. 18 U.S.C. § 1514A(c). Neither do I find a grant of jurisdiction or any other right in the regulatory language "[t]he named person may file a motion with OALJ for a stay of the Assistant Secretary's preliminary order of reinstatement". See, 29 C.F.R. § 1980.106(b)(1). This precatory language merely acknowledges a procedural tool that is traditionally available to litigants, i.e., the right to seek injunctive relief. I find nothing in the language of AIR21 or the Act that would deny that right to a party.

I further find no conflict between the statutes and the regulations. Because both the Act and AIR21 preface the grant of investigative powers with the language "in general", neither statute can be said to preclude additional procedural processes. Although the statutes seek to limit automatic stay of a reinstatement order, no where in the statutes is it suggested that such a stay is never appropriate. See, 49 U.S.C. § 42121(b)(2)(A); 18 U.S.C. §§ 1514A(b)(1) and 2; (c)(1). Moreover, administrative agencies have the power to prescribe rules and regulations to effectuate the will of Congress expressed in statutes over which the agency has administrative authority. Dixon v. U.S., 381 U.S. 68 (1965). It is appropriate for an agency to review legislative history and underlying policies to define its statutory grant of authority. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc., 435 U.S. 519 (1978). A regulation must be upheld so long as the agency's reading of the statutory intent is reasonable. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984). An agency's statutory construction must be "accorded…deference …as long as its interpretation is rational and consistent with the statute". N.L.R.B. v. United Food & Commercial Workers Union Local 23, 484 U.S. 112, 123 (1987).

Accordingly, I find that OALJ has the authority to consider a motion to stay a preliminary order of reinstatement under the Act.

B. Respondent Has Not Established the Necessary Grounds to Support a Grant of its Motion to Stay OSHA's Preliminary Order of Reinstatement

AIR21, and by reference, the Act, clearly authorizes DOL to consider the propriety of preliminary reinstatement upon its finding that there "is reasonable cause to believe that the complaint [of discrimination] has merit". 49 U.S.C. § 42121(b)(2)(A). AIR21 mandates that preliminary reinstatement be effected, notwithstanding the filing of objections by the named person. Id. Although the regulations do not set forth the standard of review for a motion of stay filed pursuant to 29 C.F.R. § 1980.106(b)(1), the statutory mandate of reinstatement dictates that a stay be granted only for extraordinary reasons. Accordingly, parties seeking an Order to set aside a preliminary order for reinstatement must be able to demonstrate circumstances similar to those supporting injunctive relief.[3] This standard of review is further supported by the public policy purposes underlying the statutory mandate of interim reinstatement, when found warranted by DOL.

It has long been established that a party seeking preliminary injunctive relief must establish that absent its grant, the party is likely to succeed on the merits; shall suffer irreparable injury; and stands to suffer harm that outweighs that to the other party and to the public. See, Fed. Rule Civ. Pro., Rule 65. Moreover, the purpose of a temporary injunction is to prevent a threatened wrong or injury until the issues under contest may be determined after a hearing. Ohio Oil Co. v. Conway, 279 U.S. 813 (1929).

Respondent argues that because Complainants are unlikely to establish a prima facie case, it is likely to succeed on the merits. The record at this juncture indicates that there is a reasonable basis to conclude that Complainants will be able to establish a prima facie case. Neither does the alleged improper conduct by Complainants, in and of itself, suggest that Respondent would succeed on the merits of its case. If Complainants prevail in meeting their burden of proof, Respondent's legitimate reason for discharge must be sufficient to have motivated its action at the time it was taken. Price Waterhouse v. Hopkins, 490 U.S. 228, 252, (1989). The evidence of Respondents' acquisition of knowledge of Complainants' alleged improper conduct, both during and post employment, is facially insufficient to establish that it would have terminated the Complainants on those grounds alone. In any event, after-acquired evidence of Complainants' misconduct is more probative of the remedies to which Complainants would be entitled, if successful in their actions. See, McKennon v. Nashville Banner Publishing Company, 513 U.S. 352 (1995). I am unable to conclude that Respondent is likely to succeed on the merits in this matter.

Respondent has not established that the reinstatement of Complainants would cause it irreparable harm. Respondent asserts that the hostility between the parties is of such degree that the employment relationship would be "untenable". Brief of Respondent, page 18. Respondent also contends that the presence of the Complainants at the worksite would be disruptive to its discovery efforts and trial preparation. Even crediting this assertion as true, Respondent has not demonstrated how the presence of Complainants would create irreparable harm so as to merit the

[3] Without expressly relying upon the Commentary to the final regulations, I note that OSHA anticipated that this criteria would be applied in determining the sufficiency of grounds supporting a stay of a preliminary reinstatement order. See, 69 Fed. Reg. 42103, 52109 (Aug. 24, 2000).

extraordinary relief of a stay. Although the after-acquired evidence of a complainant's misconduct is relevant to the question of reinstatement, see McKennon, supra, Respondent has not shown how it would be irreparably harmed upon the reinstatement of Complainants because of their misconduct.

Respondent also failed to establish that the harm it would realize from Complainants' reinstatement would outweigh that experienced by the Complainants. Complainants are unemployed, and their continued lack of salary and benefits is a harm at least as serious as the discomfort their presence at the workplace would create for Respondent. Nor has Respondent demonstrated that reinstatement is contrary to public policy. Indeed, the purpose of preliminary reinstatement is to guarantee the protections of the Act to employees whose complaints are found to be reasonable after investigation by DOL. The fact that the statute mandates reinstatement upon such finding strongly militates in favor of finding that public policy supports reinstatement of the Complainants, even given the uncomfortable circumstances that would reasonably accompany their return to the workplace. As the Court concluded in Brock v. Roadway Express, 481 U.S. 252 (1987), the government's interest in protecting employees from discrimination is promoted by providing interim relief such as preliminary reinstatement. Id. at 252, 262. Respondent has not met the balancing test of showing that its interests outweigh those of Complainants or the public.

Respondent had the opportunity to persuade OSHA that reinstatement was an inappropriate preliminary remedy.[4] Although not explicitly provided for in the statute or by regulation, OSHA may consider the option of "economic reinstatement" as an alternative to physical reinstatement in some circumstances. See, 59 Fed. Reg. 52109 (Aug. 24, 2004). Without relying upon this commentary or assuming that OSHA considered such remedy, I conclude that economic reinstatement would be constructive compliance with a preliminary order for reinstatement.

Complainant Jacques further contends that Respondent has failed to establish that the preliminary order of reinstatement should be stayed because Complainants are a security risk. Brief of Complainant Jacques, page 3. The controlling regulations provide that "[w]here the named person establishes that the complainant is a security risk (whether or not the information is obtained after the complainant's discharge) a preliminary order of reinstatement would not be appropriate".[5] 29 C.F.R. § 1980.105(a)(1). This regulation clearly directs OSHA to consider whether a complainant is a security risk when determining the propriety of issuing a preliminary order of reinstatement. I do not find that the regulations carve out an exception to the implementation of the preliminary order of reinstatement where an individual is found to be a security risk after OSHA's investigation. Nor do I find the fact that an individual poses a security risk to constitute grounds for an automatic grant of the stay referenced at 29 C.R.F. § 1980.106(b)(1). Rather, once the preliminary order is issued, I deem the consideration of whether an individual is a security risk to be a relevant factor in the determination of whether injunctive relief in the form of a stay is appropriate.

[4] I note that Respondent continues to seek to persuade OSHA that its preliminary order was improper, as reflected in correspondence from Respondent's counsel of March 4, March 7, and March 24, 2005.
[5] This language is identical to that found in AIR21's implementing regulations, at 29 C.F.R. § 1979.105(a)(1).

V. CONCLUSION

Respondent has not demonstrated that the circumstances are so extraordinary as to warrant injunctive relief from OSHA's preliminary reinstatement order. Accordingly, Respondent's Motion for Stay of that order is DENIED.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey