U.S. Department of Labor

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Issue Date: 16 July 2008

CASE NO: 2005-SOX-00093

ARB NO.: 06-033

In the Matter of:

WILLIAM J. McCLOSKEY,
Complainant

v.

AMERIQUEST MORTGAGE COMPANY,
Employer

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER OF SUMMARY JUDGMENT GRANTING RESPONDENT'S MOTION TO DISMISS

This matter arises from a complaint filed under § 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 ("the Act"). 18 U.S.C. § 1514A. An action under § 806 of the Act will be governed by 49 U.S.C. § 42121(b), which are the procedural regulations governing the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. 18 U.S.C. § 1514A(b)(2)(B). The Act affords protection from employment discrimination to employees of companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934 and companies required to file reports under § 15(d) of the Securities Exchange Act of 1934. *See* 15 U.S.C. § 781. Specifically, the Act protects so-called "whistleblower" employees from retaliatory or discriminatory actions by the employer, because the employee provided information to their employer or a federal agency or Congress relating to alleged violations of 18 U.S.C. §§ 1341, 1343, or 1348, or any provision of federal law relating to fraud against shareholders.

PROCEDURAL HISTORY

William McCloskey ("Complainant") was employed by Ameriquest Mortgage Company ("Respondent") on November 29, 2004 as an Account Executive. (ALJ1; ALJ3). Complainant filed a complaint with the United States Department of Labor's Occupational Health and Safety Administration ("OSHA") on June 16, 2005, alleging that Respondent had unlawfully discharged him in violation of employee protection

provisions of the Act. (ALJ1). On July 14, 2005, after an investigation of the complaint, the Regional Administrator for OSHA issued a determination that the investigation disclosed that Respondent was not a company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 and is not required to file reports under § 15(d) of the Securities Exchange Act of 1934, Complainant was not an employee covered under the Act, and the complaint was untimely as it was not filed within 90 days of the alleged adverse action. (ALJ2). Complainant objected to the findings on July 28, 2005. (ALJ3).

The case was referred to the Office of Administrative Law Judges ("OALJ") on July 28, 2005 and was assigned to me on August 2, 2005. I issued a Notice of Hearing on August 5, 2005. (ALJ4). Claimant submitted a letter on September 13, 2005 addressing his legal arguments. (ALJ6). A hearing was held in Philadelphia, Pennsylvania on September 27, 2005, however the Respondent was not present. I entered an Order to Show Cause why default judgment should not be entered against the Respondent on September 28, 2005. After no response from the Respondent, I issued a Decision and Order Granting Default Judgment in favor of the Complainant on December 6, 2005. The Complainant filed a petition for review with the Administrative Review Board ("ARB") on December 20, 2005 and the ARB issued a briefing schedule Order on January 10, 2006. The ARB issued an Order of Remand on February 29, 2008, instructing me to allow the Respondent an opportunity to respond to my Order to Show Cause. On May 28, 2008 I issued an Order finding good cause and instructed the Respondent to file any motions or a hearing date would be scheduled.

Respondent filed a Motion to Dismiss on June 30, 2008, alleging that the claim was time-barred because the complaint was filed outside of the ninety day limitation and that it is not an employer covered under the Act, as it nor its parent company is publicly traded. Claimant did not file a response to Respondent's Motion to Dismiss.

This decision is rendered after careful consideration of the record as a whole, the arguments of the parties, and the applicable law.

ANALYSIS

Respondent is seeking summary decision in this matter based on its status as a non-publicly traded company on the date of Complainant's termination and/or on the grounds that Complainant failed to timely file his complaint. (Resp. Motion to Dismiss at 1 ¶ 1-2).

Summary decision may be granted to either party if the pleadings, affidavits, or material obtained through discovery show that there is no genuine issue of material fact that remains to be resolved. 29 C.F.R. §§ 18.40-41. The moving party bears the initial burden to demonstrate that there is no disputed issue of material fact, which may be demonstrated by "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986); *Hall v. Newport News Shipbuilding and Dry Dock Co.,* 24 BRBS 1, 4 (1990). Upon such a showing, the burden shifts to the

non-moving party to establish the existence of a genuine issue of material fact. *Celotex,* 477 U.S. at 322. All evidence must be viewed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 261; *Hall,* 24 BRBS at 4. Where a genuine issue of material fact does exist, an evidentiary hearing must be held. 29 C.F.R. § 18.41(b).

The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary decision. *Anderson,* 477 U.S. at 247. It is not enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision. The evidence must consist of more than the mere pleadings themselves. *Celotex,* 477 U.S. at 324. A non-moving party who relies on conclusory allegations which are unsupported by factual data or sworn affidavit cannot thereby create an issue of material fact. *See Hansen v. United States,* 7 F.3d 137, 138 (9th Cir. 1993).

Accordingly, in order to withstand respondent's motion, it is not necessary for complainants to prove their allegations. Rather, they must only allege the material elements of their *prima facie* case. *Bulls v. Chevron/Texaco Inc., et. al.,* Case No. 2006-SOX-00117 (October 13, 2006).

1. Jurisdiction

Respondent's initial argument is that summary decision should be granted because it was not subject to the Act at the time of the Complainant's termination. (Resp. Motion to Dismiss at 1 ¶ 2). The relevant whistleblower provisions of the Act cover companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934" or "companies required to file reports under section 15(d) of the Securities Exchange Act of 1934[.]" 18 U.S.C. § 1514A (2007). The relevant time period for determining whether a company is publicly-traded as defined by Section 1514A is when the company takes the allegedly discriminatory action. *Roulett v. American Capital Access,* 2004-SOX-00078 (ALJ Dec. 22, 2004) (holding that an employee could not bring a claim for relief when his employer was not subject to the requirements of the Act on the date he was terminated); *Lerbs v. Bucca di Beppo Inc.,* 2004-SOX-00008 (ALJ June 15, 2004) (holding that the date of employer's retaliatory act determines when the Act applies); *Kunkler v. Global Futures & Forex, Ltd.,* 2003-SOX-00006 (ALJ April 24, 2003).

The record clearly indicates that Respondent is not a publicly-traded company nor is it required to file reports under section 15(d) of the Securities Exchange Act of 1934. (Tiberend Decl. at 2 ¶ 5). Complainant has offered no evidence to dispute this fact. I note that Complainant does not claim to be an employee of a publicly traded company or a company required to file with the SEC.[1] Similarly, Complainant does not allege that Respondent undertook its adverse personnel actions involving Complainant on behalf of any publicly traded company. Instead Complainant argues that the Act

[1] In his letter dated September 13, 2005, Complainant concedes that Respondent is a privately traded company: "I hope that my complaint with your agency will set a precedent for privately held companies…" (ALJ6 at 2).

should apply to Respondent because the company sells 25% of their loans on the Secondary Market to companies that might by publicly traded. (ALJ3 at 3). However, Complainant cites to no case law in support of his position.

The regulations define "company representative" as "any officer, employee, contractor, subconstractor, or agent of a company." 29 C.F.R. § 1980.101. The fact that publicly traded companies rely upon Respondent's services and purchase its loans does not make Respondent their contractor, subcontractor, or agent. I acknowledge that Respondent's activities have the potential to affect the financial welfare of publicly traded companies with which it does business. However, any product or service that a company purchases creates the potential for profit or loss for the company that purchases it. The Act provides specific requirements for its coverage, which I decline to expand to a non-publicly traded company solely because it engages in financial business with publicly traded companies. In fact, coverage under the Act has been found not to lie in circumstances where companies much closely related than those proposed by Complainant, were involved, such as where a subsidiary of a publicly traded company is not itself publicly traded. *See Klopenstein v. PCC Flow Technologies Holdings, Inc. and Allen Parrott,* 2004-SOX-00011 (ALJ July 6, 2004); *Powers v. Pinnacle Airlines, Inc.,* 2003-SOX-00018 (ALJ March 5, 2003). I find that coverage of the Act cannot be established on these broad grounds.

Accordingly, in consideration of the factual assertions of the parties and their arguments, I find that Respondent does not have a class of securities registered under section 12 of the Securities Exchange Act of 1934, nor is it required to file reports under section 15(d) of the Securities Exchange Act of 1934. Therefore, Respondent is not subject to the provisions of section 806 of the Act, and Complainant may not bring an action for relief thereunder.

2. Timeliness of the Complaint

Assuming, *arguendo,* that the Act applied to Respondent, I find that Complainant's complaint is barred because it is untimely. The Act provides that a whistleblower claim must be filed "within 90 days after an alleged violation of the Act occurs (i.e. when the discriminatory decision has been both made and communicated to the complainant[.])." 29 C.F.R § 1980.103(d). Respondent argues that Complainant has exceeded the 90 day filing requirement since he learned of his termination on March 1, 2005 and filed his complaint on June 16, 2005, 108 days after his termination. (Resp. Motion to Dismiss at 3).

In whistleblower cases, statutes of limitations, such as section 1514A(b)(2)(D), run from the date an employee receives, "final, definitive, and unequivocal notice" of an adverse employment decision. *See e.g., Jenkins v. United States Envtl. Prot. Agency,* ARB No. 98-146, ALJ No. 1988-SWD-00002, slip op. at 14 (ARB Feb. 28, 2003). "Final" and "definitive" notice denotes communication that is decisive and conclusive, i.e., leaving no further chance for action, discussion, or change. "Unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities. *Larry v. The*

Detroit Edision Co., 1986-ERA-00032, slip op. at 14 (Sec'y June 28, 1991); *Cf. Yellow Freight Sys., Inc. v. Reich,* 27 F.3d 1133, 1141 (6th Cir. 1994) (three letters warning of further discipline did not constitute final notice of employer's intent to discharge complainant).

Complainant argues that his complaint should be considered timely because it was filed within ninety days of his e-mail communication to Respondent's management, specifically, Branch Manager, John Koene, and Vice President of Sales, Mary Jo Shelton, in April of 2005 informing them that he was fired for reporting fraud. Complainant argues that this is an adverse action because "no action is an adverse action." (ALJ3). However, it is undisputed that Complainant was terminated on March 1, 2005. Moreover, Complainant does not suggest that his termination was ambiguous in any manner. Therefore, I find that the statute of limitations began to run on March 1, 2005.

Complainant asserts that he timely filed his complaint based upon the principles of equitable tolling and equitable estoppel. Equitable tolling and equitable estoppel may be invoked in a whistleblower case to relax the statute of limitations and excuse untimely filing of a complaint. *Rzepiennik v. Archstone Smith, Inc.,* 2004-SOX-00026, slip op. at 20 (ALJ Feb. 23, 2007). Complainant bears the burden of justifying the application of these doctrines. *Id.* Furthermore, ignorance of the law will generally not support a finding of entitlement to equitable tolling. *Moldauer v. Canadaigua Wine Co.,* ARB No. 04-022, ALJ No. 2003-SOX-00026 (ARB Dec. 30, 2005).

There are three limited exceptions in which equitable tolling may apply: (1) where a respondent actively misled the complainant respecting the cause of action; (2) where the complainant has in some extraordinary way been prevented from asserting his rights; or (3) where a complainant "has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." *School District of Allentown v. Marshall,* 657 F.2d 16, 19-20 (3rd Cir. 1981); *Halpern v. XL Capital Ltd.,* ARB No. 04-120, ALJ No. 2004-SOX-00054, slip op. at 4 (ARB) (Aug. 31, 2005).

Complainant asserts that he complied with the Act's statute of limitations by submitting letters to the SEC and a variety of governmental agencies. (ALJ6). To be considered the "precise complaint in the wrong forum," the complaints before other agencies must demonstrate that complainant engaged in protected activity under the Act prior to his discharge. *Carter v. Champion Bus, Inc.,* ARB Case No. 05-076, ALJ Case No. 2005-SOX-23, (ARB Sept. 29, 2006). Letters to other agencies only establish a complaint under the Act if the specific factual allegations may reasonably be considered to fall within the six specified categories of protected activities under the Act. *Harvey v. The Home Depot, Inc.,* ALJ 2004-SOX-00020.

Complainant sent letters to the Tredyffrin Township Police Department on February 3, 2005 and February 5, 2005 alleging that Respondent's managers were forging Borrowers Authorization Forms. (ALJ1). This correspondence was written before Complainant's termination on March 1, 2005. Even if these letters were read to

provide notice of the enumerated types of fraud or securities violations, they could not be read to state a claim for relief for an act of retaliation that had not yet taken place. As such, I find that Complainant has not shown that these letters were a precise statutory claim filed in the wrong forum.

On March 2, 2005 Complainant sent a letter to the Pennsylvania Department of Banking alleging that he was fired from Respondent for reporting instances of forgery of Borrowers Authorization Forms among the managers. (ALJ1). However, none of these allegations, if taken as true and in the light most favorable to him, relates to mail fraud, wire fraud, bank fraud, or securities fraud. Likewise, his allegations do no point to violations of SEC rules and regulations, which regulate the issuance of, and transactions involving, the securities of publicly traded companies. *See Levi v. Anheuser Busch Companies, Inc.,* ARB Nos. 06-102, 07-020, 08-006, ALJ Nos. 2006-SOX-00037, 2006-SOX-00108, 2007-SOX-00055 (ARB April 30, 2008). Complainant did not raise a specific fraud allegation with regard to the forgery incidents. However, while those allegations may give him a civil cause of action or possibly violate other laws, they still do not involve a violation of federal law which protects shareholders themselves from fraud. As such, I find that Complainant has not shown that this letter was a precise statutory claim filed in the wrong forum. In any event, this letter is of no help to Complainant, as it predates his complaint filing by more than 90 days.

Complainant asserts that he contacted the SEC within ninety days of his termination. Complainant admits that the SEC responded to his letter on March 1, 2005. (ALJ6). The letter Complainant sent to the SEC is not part of the record; therefore, I am unable to determine whether it included specific allegations related to the six areas of violations under the Act. Furthermore, since the SEC's response to Complainant's letter was sent on March 1, 2005, it may be inferred that Complainant's letter to the SEC was sent prior to his termination date on March 1, 2005. Even if these letters were read to provide notice of fraud or securities violations, it could not be read to state a claim for relief for an act of retaliation that had not yet taken place. As such, I find that Complainant has not shown that this letter was a precise statutory claim filed in the wrong forum. I also note that Complainant admitted that the SEC notified him in the March 1, 2005 letter that the Act "had very short deadlines". (ALJ6). I find that this establishes that he had notice of the short nature of the statute of limitations under the Act.

Finally, Complainant requests that his complaint be considered timely pursuant to the doctrine of equitable estoppel. Under the doctrine of equitable estoppel, "a late filing may be accepted as timely if an employer has engaged in 'affirmative misconduct' to mislead the complainant regarding an operative fact forming the basis for a cause of action, the duration of the filing period, or the necessity for filing." *Halpern,* ARB Case No. 04-120, slip op. at 5. Equitable tolling focuses on the complainant's inability to obtain necessary information despite his due diligence, while equitable estoppel focuses on wrongdoing by the respondent. *Rzepiennik,* 2004-SOX-00026 at 20.

Complainant claims that Respondent affirmatively misled and prevented him from filing a timely complaint because they did not inform him of the 90 day limitation when he informed them that he planned to initiate a Sarbanes-Oxley whistleblower claim. (ALJ6). In *Moldauer,* ARB No. 04-022, (ARB Dec. 30, 2005), the ARB granted summary judgment to the respondent on the ground that the complaint was not timely filed. The complainant asserted that equitable modification of the limitations period should be applied because the respondent actively misled him when it remained silent about its position that a release excluded claims under the Act. The ARB, however, found that the respondent's mere silence about the Act did not mislead the complainant. In this case, I find that Respondent's silence regarding the statute of limitations was not an affirmative action that misled the complainant. Therefore, I find that there are not grounds for equitable estoppel of the statute of limitations.

CONCLUSION

Based on the foregoing, I find that Respondent does not have a class of securities registered under section 12 of the Securities Exchange Act of 1934, nor is it required to file reports under section 15(d) of the Securities Exchange Act of 1934. Accordingly, Respondent is not subject to the provisions of section 806 of the Act. Further, I find that the complaint filed on June 16, 2005 is barred because it was not timely filed within the 90-day statute of limitations imposed by 18 U.S.C. § 1514A(b)(2)(D). The statutory period began on March 1, 2005, when Complainant was terminated from his employment with Respondent.

ORDER

It is hereby ORDERED:

The Complaint of William J. McCloskey against Ameriquest Mortgage Company under the Sarbanes-Oxley Act is hereby DISMISSED.

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RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey

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, Suite S-5220, 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).