U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 11 February 2005

CASE NO: 2005-SOX-00017

In the Matter of

DAVID WINDHAUSER
Complainant

v.

TRANE,
an Operating Division of AMERICAN STANDARD, INC.
Respondent

DECISION AND ORDER
DENYING RESPONDENT'S MOTION TO STAY
THE SECRETARY'S ORDER OF REINSTATEMENT

This proceeding 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, 18 U.S.C. § 1514A ("the Act"). The Act forbids publicly traded companies from retaliating against employees who provide information to designated authorities indicating their belief that the employer has violated a rule or regulation of the Securities and Exchange Commission or another federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1). The regulations promulgated under the Act are contained in 29 C.F.R. Part 1980 and became effective on August 24, 2004.

A complaint was filed by Mr. Windhauser ("Complainant") on February 6, 2004. The Assistant Secretary of the Occupational Safety and Health Administration ("OSHA") issued a decision[1] on November 15, 2004, finding reasonable cause that Complainant was discharged from employment in violation of the Act. As a result, Trane ("Respondent") was ordered to (1) remove any disciplinary letters from Complainant's personnel file, (2) reinstate Complainant to his former position of Controller and (3) pay complainant $105,489.55 in backpay and other compensatory remedies. (Order at 4).

On December 14, 2004, Respondent filed objections to the Secretary's Order and a Motion to Stay the Secretary's Preliminary Order of Reinstatement.[2] Because OSHA has a significant interest in the outcome of this matter, I ordered the Government to show cause why Respondent's Motion should not be granted. I received a response from the Assistant Secretary

[1] The Secretary's Findings and Preliminary Order consists of 7 pages and will be referred to herein as "Order" and cited as "Order at --."
[2] This filing will herein be referred to as the "Motion" and will be cited as "Motion at --."

on January 19, 2005.[3] Complainant's opposition to Respondent's Motion was received on January 20, 2005.[4] Respondent requested leave to file a response to the opposition filed by the Assistant Secretary and Complainant. Such leave was granted and Respondent's response was received on February 2, 2005.[5] Complainant and the Assistant Secretary each submitted an affidavit signed by Complainant with their opposition briefs. Respondent submitted several exhibits, some attached to its Motion and the others attached to its reply brief.[6]

I. THE ASSISTANT SECRETARY'S FINDINGS AND PRELIMINARY ORDER

The Assistant Secretary made the following findings of fact:

1. Respondent is a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 and is required to file reports under Section 15(d) of that act.
2. Complainant was employed by Respondent until terminated on November 12, 2003.
3. The complaint alleging violations of the Act was timely filed.[7]
4. In October, 2003, while employed by Respondent, Complainant questioned Mr. Bregenzer, the District Manager and Ms. Scarborough, who was then the Controller, regarding Respondent's accounting practices.
5. The questions that Complainant raised concerned expenses that Respondent had not booked in the second and third quarters of 2003.
6. Complainant felt that this accounting practice was possibly fraudulent since it caused Respondent's profit to be overstated.
7. OSHA's review of Respondent's records indicated that certain expenses were not properly recorded.
8. Complainant attempted to book expenses properly at the end of September, 2003, but was ordered by Mr. Bregenzer to remove the expenses.
9. Ms. Scarborough eventually removed the expenses, as evidenced by an internal audit and documented on the People-Soft system used by Respondent's accounting firm.
10. On November 12, 2003, Mr. Bregenzer informed Complainant that he was terminated effective the same day.
11. The termination of Complainant occurred in close proximity to the time that Complainant approached Mr. Bregenzer and Ms. Scarborough regarding improper accounting practices.

(Order at 1-2).

Based on the foregoing, the Assistant Secretary found that Complainant engaged in protected activity. (Order at 2). The Assistant Secretary also found that the small amount of time between Complainant engaging in that activity and his termination "is sufficient evidence

[3] The Assistant Secretary's opposition brief will be cited as "ASB at --."
[4] Complainant's opposition brief will be cited as "CB at --."
[5] Respondent's reply brief will be cited as "Reply Br. at --."
[6] I consider this evidence only to the extent that it is relevant in granting or denying Respondent's Motion, as this is not the proper time to make credibility determinations or to decide the merits of the case.
[7] The first three findings of fact were stipulations entered into by the parties. (Order at 1).

under these circumstances to establish reasonable cause to believe that Complainant's protected activity was a contributing factor in Respondent's decision to terminate his employment." (Order at 2). In addition, the Assistant Secretary considered the information submitted by Respondent and Respondent's arguments but found the arguments to have no merit. (Order at 3-4). Of interest, the Assistant Secretary found that Respondent did not prove that Complainant signed a third quarter report indicating that Respondent's expenses were properly booked,[8] and found that the performance appraisal that Respondent submitted was of little probative value because it was not dated. (Order at 3-4).

II. ANALYSIS

A. A motion to stay a preliminary order of reinstatement should be granted only upon a showing of exceptional circumstances.

The relevant part of 29 C.F.R. § 1980.106(b)(1) provides:

> The portion of the preliminary order requiring reinstatement will be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections to the order. The named person may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement.

However, the regulations are silent as to the standard of review that must be satisfied in order for such a motion to be granted.

Respondent argues that its Motion should be granted if "sufficient grounds" exist. (Motion at 5). In reaching such a conclusion, Respondent points out that in discussing the above regulation, OSHA noted that it would be helpful to have a provision similar to that allowing for motions to stay a preliminary order of reinstatement found in the Pipeline Safety Improvement Act of 2002 ("PSIA"), 49 U.S.C. § 60129. *See* 69 Fed. Reg. at 52109 (Aug. 24, 2004). Respondent then points to the legislative history of that part of the PSIA, which states in relevant part:

> The intention of this language is to assure that the mere filing of an objection would not work as an automatic stay, thus precluding an employee from returning to work pending the outcome of the matter. <u>This language would not preclude an employer from filing an independent motion for a stay if sufficient grounds exist for the filing of such a motion</u>.

148 Cong. Rec. S11068 (Nov. 14, 2002) (emphasis added by Respondent). Respondent then concludes that "the legislative history quoted above indicates that the appropriate standard [for granting or denying its Motion] is whether 'sufficient grounds exist' for a stay."

[8] The third quarter report submitted by Respondent did not bear Complainant's actual signature. Further, the report indicated that it was to be signed by the Controller, and Complainant was not the Controller on the date that it was submitted. (Order at 3).

Respondent misconstrues the legislative history.[9] Clearly, a motion to stay can be *filed* if "sufficient grounds exist," but as Complainant and the Assistant Secretary point out, the motion to stay should be *granted* only in "the exceptional case," as provided in 69 Fed. Reg. at 52109 (August 24, 2004). (ASB at 5; CB at 9). OSHA's intent was for a motion to stay to be granted only if the respondent was able to establish the criteria necessary for injunctive relief, i.e. irreparable injury, likelihood of success on the merits, and a balancing of harms to the parties and the public. 69 Fed. Reg. at 52109.

B. Because Respondent has not established the criteria necessary for granting injunctive relief, the Motion to Stay the Preliminary Order of Reinstatement is denied.

Respondent argues that if forced to reinstate Complainant to his former position as Controller, Respondent would suffer irreparable harm because it would not be able to comply with the reporting and certification requirements of the Act since Complainant is incompetent to perform his assigned tasks. (Motion at 6; Reply Br. at 6-7). The only hard evidence that Respondent points to in order to support this argument is the performance evaluation of Complainant. As the Assistant Secretary noted in her Order, the copy of the performance evaluation submitted to OSHA was not dated and was not signed by Complainant, causing it to be of little probative value. Further, Respondent points to no specific occasion where Complainant caused Respondent to be in noncompliance with the Act or where Complainant caused any type of severe financial difficulty. I will not speculate that such a situation will occur in the future based solely on Respondent's argument that it will.

Respondent also argues that reinstatement of Complainant will cause irreparable injury because Respondent will be forced to terminate Complainant's replacement. (Motion at 6). However, after Complainant was discharged from his position as Controller, Ms. Scarborough, who preceded Complainant in that position, performed that job temporarily while also performing the duties of her new position. Not until February 1, the same day that Respondent filed its Reply brief, did Respondent promote someone to the position of Controller. (Affidavit of M. Bregenzer at ¶14-15). Therefore, this argument is hardly valid. Knowing that its reply brief was the last document to be filed before I decided whether to stay the Assistant Secretary's Order, Respondent filled Complainant's position on the same day of that filing. Further, the position was filled internally, by the individual who served as Assistant Controller when Complainant was Controller. It is not easily accepted that Respondent's search for the right candidate coincidentally concluded on the date that it was to file its Reply Brief. Respondent cannot now argue that it will suffer irreparable harm because it decided to fill Complainant's position on the eve of this decision after not having filled the position for over a year.

[9] Remarkably, Respondent, in its brief, attacks the Assistant Secretary for rejecting its argument that "sufficient grounds" is the standard for granting a motion to stay in this case. Respondent goes as far as accusing the Assistant Secretary of "abandon[ing] her duty faithfully to follow the law" and of "abdicating her duty to the public" and cites to the Model Rules of Professional Conduct, insinuating that the Assistant Secretary has violated them. *See* Respondent's Reply Brief at p. 3, n. 2. Clearly, it is Respondent who is grasping at straws to support an argument that clearly has no basis in the law.

Respondent also cannot establish the other requirements necessary for injunctive relief. The Assistant Secretary found for Complainant after OSHA conducted what it considered a thorough investigation of the claim. Respondent argues that the Assistant Secretary made erroneous findings of fact which led to her improperly concluding that there was reasonable cause to believe that Respondent discharged Complainant in violation of the Act. I find these proffered clarifications of fact to be insufficient to show that Respondent is likely to be successful on the merits. For example, because Complainant submitted a document electronically which certified that the third quarter information was accurate to the best of his knowledge (Affidavit of D. Vaughan at ¶ 3), does not indicate that there were not improprieties occurring that Complainant was aware of. Such would be the case in a perfect world, but I cannot assume that Complainant would not have certified the financial information had he speculated that the information was not completely correct. Also, Respondent notes that the performance evaluation, which contains some negative comments regarding Complainant's work, was completed on October 3, 2003 (Affidavit of M. Bregenzer at ¶ 2), therefore showing that Respondent had a valid reason for terminating Complainant's employment. However, this fact may well be construed as damaging to Respondent's case, since after making these negative comments on the performance evaluation, Complainant was promoted from Assistant Controller to Controller less than two weeks later. (01/17/04 Affidavit of Complainant at ¶ 7 and n. 1). It may thus be reasonably inferred that despite some shortcomings, Respondent felt that Complainant was competent. Respondent cannot now point to this evaluation to establish that Complainant is incompetent. In addition, Complainant's first inquiry regarding the legality of certain accounting practices preceded the evaluation. (01/17/04 Affidavit of Complainant at ¶ 4), thus diluting the probative impact of the same.

Further, Respondent has not shown that any harm that will be caused should Complainant be reinstated outweighs the harm that will be caused to Complainant and to the public if Complainant is not reinstated to his former position. I have already rejected Respondent's argument that it will be harmed by having to reinstate someone who it classifies as incompetent. Complainant, on the other hand, is being harmed financially (albeit minimally). The public interest will suffer the most harm if I grant Respondent's Motion. The Act was designed to protect the public from the corporate fraud that has become too well known in this post-Enron era. The Act provides protection to whistleblowers in order to encourage the reporting of fraud against shareholders. If the Motion is granted and Complainant therefore not reinstated to his former position, the public suffers because less people will be likely to "blow the whistle" in the future, if the law does not adequately protect them.

III. CONCLUSION

Because Respondent is unable to show the existence of special circumstances by establishing the criteria necessary for injunctive relief, Respondent's Motion is denied.

ORDER

It is hereby **ORDERED** that Respondent's Motion to Stay the Preliminary Order of Reinstatement is **DENIED**.

A

RALPH A. ROMANO
Administrative Law Judge