



Issue Date: 02 July 2007

CASE NO. 2007-SOX-0006

In the Matter of:

ARLENE ROWLAND,
Complainant,

vs.

NATIONAL ASSOCIATION OF SECURITIES DEALERS;
PRUDENTIAL FINANCIAL, INC. AND PRUDENTIAL EQUITY GROUP, LLC; and
WACHOVIA SECURITIES, LLC AND WACHOVIA CORP.,
Respondents.

RECOMMENDED DECISION AND ORDER DISMISSING THE COMPLAINT

This proceeding arises under the employee protection provisions of the Sarbanes-Oxley Corporate and Criminal Accountability Act of 2002, 18 U.S.C. § 1514A.

Procedural History

On December 15, 2006, I issued a notice of docketing and assignment, and order setting forth discovery and briefing schedule as to threshold issues.

On February 23, 2007, I issued an order granting Respondents an extension of time to file a motion to dismiss or for summary decision, and amending the briefing schedule.

On March 9, 2007, Respondents filed their motions to dismiss or, in the alternative, for summary decision.

On March 16, 2007, Complainant filed a request for an extension of time from March 23, 2007 until April 23, 2007 to respond to Respondents' motions. On March 21, 2007, I issued an order granting Complainant an extension of time until April 23, 2007 to respond to Respondents' motions.

On April 23, 2007, Complainant filed a second request for an extension of time from April 23, 2007 until May 23, 2007 to respond to Respondent's motions. On April 27, 2007, I issued an order granting Complainant an extension of time until May 23, 2007 to respond to Respondents' motions. However, I noted that this was the second extension that I had granted

Complainant for virtually the same reasons, and stated that no further extensions would be granted absent exigent circumstances.

On May 22, 2007, Complainant filed exhibits to her opposition to Respondent's motions to dismiss and/or for summary judgment. Complainant stated that she filed these exhibits by overnight mail on May 22, 2007, but she did not provide a service sheet or declaration certifying that these exhibits had been served on the other parties. Complainant's exhibits were received by this office on May 23, 2007.

On May 31, 2007, Respondents Prudential Financial, Inc. and Prudential Equity Group, LLC ("Prudential") filed a notice of Complainant's failure to file any opposition to Respondents' motions. Prudential moved for dismissal of Complainant's complaint based on her non-opposition to its motion to dismiss. Prudential's notice was received by this office on May 31, 2007.

Also on May 31, 2007, Respondent National Association of Securities Dealers, Inc. ("NASD") filed a reply in support of its motion to dismiss, or in the alternative, for summary decision. NASD moved for Complainant's complaint to be dismissed, pursuant to 29 C.F.R. §§ 18.6 and 18.40, based on her failure to respond to its motions. NASD's reply was received by this office on May 31, 2007.

Also on May 31, 2007, Complainant filed her consolidated opposition to Respondents' motions to dismiss and/or for summary judgment. Complainant's certificate of service stated that she served her opposition with exhibits on all parties by mail on May 31, 2007. Complainant's opposition was received by this office on June 1, 2007. Complainant conceded that her opposition was not timely filed, stating, "Although most of the exhibits were filed prior to your deadline, this written opposition (with additional exhibits attached) has been delayed, most recently because of persistent technology hacking that continually interferes with research and word-processing. A great deal of this work was conducted at the Ventura County Law Library in Ventura, California, and the hacking directed at Complainant caused problems with the computers there as well. One librarian said that all of the computers required new hard-drives and upgraded security because of problems recently. Complainant could provide you with a written statement from one of the librarians, if necessary."

On June 5, 2007, I issued an order requiring Complainant to show cause on or before June 22, 2007 why her complaint should not be dismissed, pursuant to 29 C.F.R. § 18.6(d)(2), for failure to comply with orders and timely file her response to Respondents' motions.

As of the date of this order, Complainant has not responded to the June 5, 2007 order to show cause.

Discussion

First, I find that Complainant's complaint should be dismissed for failure to comply with the April 27, 2007 order requiring that she file her response by May 23, 2007. Pursuant to 29 C.F.R. § 18.6(d)(2)(v), when a party fails to comply with an order, the administrative law judge

is authorized to strike all or part of the pleading or motion filed by the non-complying party, concerning which the order was issued, or render a decision of the proceeding against the non-complying party, or administer both of the above sanctions. I emphasized in my April 27, 2007 order that Complainant's response must be received by May 23, 2007, and that no further extensions would be granted absent exigent circumstances, because this was Complainant's second extension request for virtually the same reasons. Despite this order, Complainant's opposition was not received by this office until June 1, 2007.

I find that Complainant's response was filed more than one week late without adequate justification. Complainant's only attempt to justify her late filing was her allegation in her May 31, 2007 opposition that "persistent technology hacking" directed at her interfered with her research and word-processing. In support of this allegation, Complainant offered to provide a written statement from a librarian at the Ventura County Law Library that "all of the computers [there] required new hard-drives and upgraded security because of problems recently." I find that Complainant failed to provide, either in her May 31, 2007 opposition or in response to the June 5, 2007 order to show cause, any evidence in support of her allegation that her response was delayed by Respondents' hacking. Moreover, I find that, if such hacking had occurred, the proper procedure would have been to request an extension before the filing deadline had expired.

I also find that the fact Complainant's exhibits to her opposition were received by this office on the May 23, 2007 deadline does not render her response timely. Complainant failed to provide a service sheet or declaration confirming that her exhibits had been served on the other parties. Neither Respondent NASD's reply nor Respondent Prudential's notice, both of which were filed on May 31, 2007, indicated that they had received Complainant's exhibits. Thus, I find that Complainant failed to serve her exhibits on the other parties within the filing deadline. Pursuant to 29 C.F.R. § 18.4, copies of all documents shall be served on all parties of record by personal delivery or by mailing a copy to the last known address, and the person serving the document shall certify to the manner and date of service. Documents must be served on all parties to be considered properly and timely filed. In addition, failure to comply with rules and orders regarding proper service may warrant dismissal of a complaint. *See Steffenhagen v. Securitas Sverige, AR, 2003-SOX-24 (ALJ Aug. 5, 2003); Cummings v. USA Truck, Inc., 2003-STA-47 (ALJX Jan. 9, 2004).*

Second, I find that Complainant's complaint should be dismissed for failure to respond to the June 5, 2007 order to show cause. *See Harnois v. American Eagle Airlines, 2002-AIR-17 (ALJ Sept. 9, 2002) (citing Jackson v. Northeast Utilities Co., ARB No. 98-041, ARB No. 98-35, ALJ No. 98- ERA-6 at 2 (ARB June 22, 1998) and Staskelunas v. Northeast Utilities Co., ARB No. 98-035, ALJ No. 1998-ERA-7 (ARB My 4, 1998) (both upholding dismissal for failure to respond to order to show cause)); Russell v. Challenger Motor Freight, Inc., 97-STA-27 (ALJ Oct. 16, 1997).*

Conclusion

For all of the above reasons above, I find that Complainant's complaint should be dismissed for failure to comply with the April 27, 2007 order and failure to respond to the June 5, 2007 order to show cause. Accordingly, Complainant's complaint is hereby **DISMISSED**.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge

ABT:eh

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).