U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 October 2004

CASE NO.: 2004-SOX-00049

In the Matter of:

L. THOMAS RICHARDS,
Complainant

v.

LEXMARK INTERNATIONAL, INC.
Respondent

ORDER DENYING RESPONDENT'S SUMMARY DECISION MOTIONS

The above captioned matter arises from a claim brought under the whistleblower protection provisions of the Sarbanes-Oxley Act, codified at 18 U.S.C. §1514A (hereafter "the Act").[1] The statute and implementing regulations (appearing at 29 C.F.R., Part 1980) prohibit retaliatory or discriminatory actions by publicly-traded companies against their employees who provide information to their employer, a federal agency, or Congress, alleging violation of any Federal law relating to securities fraud or fraud against shareholders.

The matters before me are two motions for summary decisions filed by Respondent on July 20, 2004 (based upon the alleged untimeliness of the hearing request) and July 26, 2004 (based upon the merits of the claim) and a Motion to Strike, or in the alternative, a Motion for a Continued Hearing Date filed by Complainant on July 26, 2004.[2] The motion to strike sought to strike Respondent's second motion for summary decision based upon an alleged failure of Respondent to comply with Complainant's discovery requests. For the reasons set forth below, I am denying both motions for summary decision filed by Respondent. Complainant's motion to strike is moot based upon my ruling on both summary decision motions.

Respondent's First Motion for Summary Judgment is accompanied by three exhibits ("RXA", "RXB", and "RXC"). Complainant filed an Opposition to the First Motion with three exhibits attached thereto ("CXA", "CXB", and "CXC"); "CXA" has five attachments

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[1] The whistleblower protection provisions appear at section 806 of the Sarbanes-Oxley Act, in title VIII, entitled the "Corporate and Criminal Fraud Accountability Act of 2002" (Sarbanes-Oxley Act of 2002, title VIII, §806, Public Law 107-204, 116 Stat. 745, 802-04 (2002)).

[2] My Order Canceling Hearing and Scheduling Order of August 4, 2004 canceled the scheduled hearing, as requested in the alternative motion for continuance.

(referenced herein as "CXA1" through "CXA5"). Respondent also filed a Second Motion for Summary Judgment with eight exhibits ("RX1" through "RX8"). Complainant filed a response to the Second Motion with three additional exhibits ("CX1", "CX2", and "CX3"). Supporting documents also include the transcripts of the Deposition of William D. Rogers taken on July 14, 2004, submitted by Respondent in support of the First Motion (RXC); the Deposition of Terry Heeter taken on June 21, 2004 and July 7, 2004, submitted by Respondent in support of the Second Motion (no exhibit number); and the Deposition of L. Thomas Richards taken on April 19, 2004, submitted by Complainant along with its response to the Second Motion (CX3).[3]

PROCEDURAL HISTORY

On or about April 1, 2003, L. Thomas Richards ("Richards" or "Complainant"), filed a complaint ("Complaint") with the Occupational Health and Safety Administration ("OSHA") under the Sarbanes-Oxley Act alleging that his former employer Lexmark International, Inc. ("Lexmark" or "Respondent") terminated him in retaliation for raising concerns about accounting practices. (CXA1). On August 18, 2003, OSHA issued a determination letter stating that it was not reasonable to believe that Respondent violated the whistleblower provisions of the Sarbanes-Oxley Act, because the Respondent showed by clear and convincing evidence that it planned to terminate Richards two months prior to the actual dismissal for reasons unrelated to his claims regarding accounting practices.[4] (CXA3).

By letter of April 28, 2004, the Complainant filed objections to OSHA's determination and requested a hearing before an administrative law judge. (CXA). On May 24, 2004, a Notice of Assignment, Notice of Hearing and Prehearing Order was issued, which scheduled the hearing in this matter for August 13, 2004 and set forth other filing deadlines. On July 7, 2004 Complainant filed a Motion for Expedited Discovery Responses requesting all discovery requests to be answered within twenty (20) days, and the motion was granted on July 8, 2004. On July 20, 2004 Respondent filed the First Motion for Summary Judgment, alleging that the Complainant failed to file a timely and proper objection to OSHA's determination. Complainant filed a Response to the First Motion for Summary Judgment on July 27, 2004 . On July 26, 2004 Respondent filed a Second Motion for Summary Judgment alleging no genuine issue as to a material fact and seeking judgment in its favor on the merits of the claim. The same day, by facsimile, Complainant filed "Complainant's Motion to Deny and/or Strike Respondent's Second Motion for Summary Judgment, and in the Alternative, a Motion for Extension of Time to Respond and to Continue Hearing Date" on the basis that Respondent had not responded to discovery requests. Respondent filed a Response to Complainant's motion on July 29, 2004. Complainant filed a Response to Respondent's Second Motion for Summary Judgment on August 3, 2004.

A telephonic conference was held on August 3, 2004 to discuss pending motions and the continuance of the hearing date. The case was scheduled to be heard on August 13, 2004; however two motions for summary decision were still pending. In addition, Mr. Miller, on

[3] Depositions will be referenced herein by the name of the deponent followed by the page number or exhibit number (e.g., "Heeter Depo. at –").
[4] A complainant has 30 days from the receipt of OSHA'S findings to file objections and request a hearing on the record, or they will become final and not subject to court review. 29 C.F.R. §1980.106(a).

behalf of Complainant, indicated that additional discovery would be required in view of the number of witnesses listed by Lexmark.[5] At that time, I advised the parties that I would be issuing an Order denying both summary decision motions and would be granting the alternative continuance request. On August 4, 2004, an Order Canceling the Hearing and Scheduling Order was issued, and a Second Amended Notice of Hearing and Prehearing Order was issued on August 6, 2004 that provided the new hearing date for the week of December 6, 2004.

FACTUAL BACKGROUND

Complainant L. Thomas Richards became employed by Lexmark on or about February 12, 2001. *Complaint at 1*.[6] At the beginning of his employment, Richards worked with Lexmark's Consumer Printer Division, remaining there until April or May 2002, when he transferred to the position of Director of Supply Chain Programs. *Complaint at 2*; *Heeter Depo. at 187*. Mr. Terry Heeter ("Heeter"), Director of Supply Chain Practices, was his direct supervisor. *Complaint at 2*. Heeter reported to Donna Covington ("Covington"), Vice President of Operations. *Id*. Heeter stated that he had concerns about transferring Richards into his group, because Richards had not demonstrated an ability to maintain good working relationships with other managerial and executive employees. *Heeter Depo. at 101-03*. In addition, he was concerned about Richards' ability to deliver timely results on projects. *Id*. Due to Heeter's concerns, Richards was given a written set of specific objectives upon his transfer into the group to be accomplished on a specific timetable. *Id.*; *RX 1*. Objectives for Richards included both short term project objectives and personal and role development objectives with specific deadlines. One of the objectives was "developing improved working relationships" to be accomplished by August 1, 2002. *RX 1*.

In July 2002, Richards was provided with a merit pay increase of 2.1 percent. *Heeter Depo. at 163-62*. Heeter testified that he had received complaints about Richards' ability to get along with coworkers but felt it was too early to pass critical judgment. *Id. at 171*. He had not reached any conclusions about Richards' performance at that point in time. *Id. at 170-71*.

Some time between July and October 2002, Richards began to have performance problems, according to Heeter. *Heeter Depo. at 188*. One example is when Richards hired an outside consultant (Born Consulting) to perform a Manugistics software upgrade contract without first obtaining authorization from the IT Group, thereby generating friction between Heeter's organization and the IT group (specifically, Andy Kopp). *Id. at 188-90, 200-10*.[7]

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[5] Lexmark named thirty-three (33) factual witnesses in its Witness list. Complainant alleges that he was only given nine (9) names originally and twenty-four (24) additional witnesses were added to the list on August 2, 2004. Thus, he would be unable to depose the additional witnesses by the August 3, 2004 discovery deadline.

[6] The complaint appears as CXA1. In ruling upon the pending summary decision motions, I will generally accept all facts alleged by Complainant in the complaint as true and I will draw all reasonable inferences in his favor.

[7] Heeter acknowledged Richards' claim that he had requested IT approval but, due to delays from the IT and legal services groups, he acted before receiving it in order to maintain continuity in the personnel working on the project from Born, which was a subcontractor working on other aspects of the project. *Heeter Depo. at 203-09*. As a result, the cost was taken out of Heeter's budget and was not paid by IT. *Heeter Depo., Exhibit 15.* In his November 11, 2002 comments to Heeter, Richards acknowledged that he failed to get the proper paperwork in place for prompt payment of the invoices and agreed to leave the negotiations to IT in the future. *Heeter Depo. Exhibit 8.*

On or about October 18, 2002, Richards was informed by Heeter that he had not made sufficient progress in accomplishing his work objectives. *Complaint at 2*. Heeter told Richards to consider other departments within Lexmark that he could consider transferring into, which might be a better fit, but that Covington was unlikely to approve the transfer. *Id*. Heeter does not dispute that he made the statement but asserts that he said it at a later point in time, during the formal review which took place in the first part of November. *Heeter Depo. at 213-24.*

A Progress Review dated November 7, 2002, indicates the areas in which Heeter determined that Richards had fallen short in achieving his objectives. *RX3.*[8] Heeter first discussed the Progress Review with Richards on or about November 8, 2002. *RX4.* Richards advised Heeter that he felt that Heeter had not considered all the factors impacting the objectives and had not given him proper credit for the other work he had done. *Complaint at 2*. On November 11, 2002, Richards sent a written response to Heeter detailing his version of his job performance. *Heeter Depo. Exhibit 8.* They met to discuss the matter further on November 11 or 12, 2002, at which time Heeter acknowledged the accuracy of Richards' statements but still expressed his concern about the objectives not being met. *Complaint at 2; RX4.* Upon asking if his job was in jeopardy, Richards was informed by Heeter that it was not. *Complaint at 3*. Richards' subsequent efforts to obtain other positions at Lexmark were unsuccessful. *Id*.

In the fall of 2002, several conversations took place between Heeter and Covington concerning Richards' work performance and his failure to meet the specified objectives, particularly the one on developing relationships. *Heeter depo. at 176-179.* Covington sent an e-mail on October 28, 2002 confirming her prior conversation with Heeter and stating the following in pertinent part:

> Terry, I wanted to make sure that we were on the same page in regards to headcount for your org for the end of the year. We have discussed the following:
> . . . .
>
> 2. Dismissal of Tom Richards, before end of the year - let me know if you need my help with this one and please keep me abreast of what is going on. . . .

RX2. Heeter disputes that a definite decision had been made at that time to terminate Richards but testified that he had already discussed the potential for Richards' dismissal with Covington and was keeping Jean Marie Suggs at Human Resources informed for that reason. *Heeter Depo. at 176-77, 225-27, 264-66.* When asked at his deposition when the decision to terminate Richards was made, Heeter testified:

> . . .I'm going to say it was around the November – mid-November time frame. . . . [T]he reason why that's difficult to answer is because we knew that there was a performance issue, and we knew we were working that performance issue with Tom, we knew during the October/November time frame that one of the possible outcomes of that performance issue is termination, but I don't think at that – early on that point in time we were absolutely certain. As we progressed through

[8] Because of the potential for Richards' termination, Heeter sent his November 7, 2002 critique of Richards' performance to Human Resources on November 8. *Heeter Depo. at 265-66*.

> November, it became clearer that that was the course that we were on, that that was the path we were going down.

Heeter Depo. at 219. He went on to explain that the decision was not reached until after he conducted the evaluation with Richards in early November. *Id. at 119-120.* Heeter filled out a formal "REACH" performance evaluation on November 27, 2002, which placed Richards in the "needs improvement" category, but he did not provide a copy to Richards. *Id. at 296-302, Exhibit 14*. When asked whether he had made the decision to terminate Richards by November 27, Heeter stated that they were "close to making a decision as to what the outcome would be" and he could not say whether it was "on that day or before that day, but it was in the late-November time frame." *Id. at 299*. Heeter testified that the decision was, however, made before December 13. *Id at 205.*

According to the complaint, Richards participated in a project review meeting with Heeter and Covington on or about November 26, 2002, when Covington informed him that she was very pleased with his work on a project that she had assigned to him. *Complaint at 3*.

In the middle of December, Heeter assigned Richards, as part of a team, to work on a project related to reducing Lexmark's inventory investment and reducing obsolete inventory write-offs. *Complaint at 3*. According to the complaint, Heeter stated that the assignment was considered a key assignment due to Lexmark's inflated levels of inventory over the preceding two years, which was one of Lexmark's biggest challenges. *Id*. In that context, Heeter referenced a securities class action that had been brought against Lexmark based upon its SEC filings. *Id.*

However, on December 17, 2002, Covington sent an e-mail to Jeri Stromquist, head of Human Resources, which suggested that she planned to fire Richards after the holidays:

> Jeri, I spoke with Terry last week re: Tom Richards and when we should inform him of our intentions. After discussing with Terry we decided to wait until the first of the year. So the plan would be to inform Tom when we return from the holiday. I will review the total package with Terry and Jean Marie this week before the holiday.
>
> Thanks
> Donna

RX6. The Supply Chain Practices Organization Chart, reflecting organizational changes for 2003, that Heeter e-mailed Covington on December 30, 2002 did not include Richards as a member of the department, although several positions were marked "TBD" [to be determined]. *RX8.*

According to the complaint, Richards reported his preliminary analysis on the inventory project to Heeter on Friday, January 3, 2002. *Id.* Richards asserted that Lexmark's method understated the number of days items remained in inventory and would lead to erroneous inventory management reporting. *Complaint at 4*. Richards claims that Heeter then expressed a

concern that if the inventory numbers were calculated according to Richards' recommendations, it would result in lower annual 2002 incentive compensation bonuses for Lexmark's supply chain employees (e.g., Heeter and Richards). *Richards Depo., CX3 at 143-44; Complaint at 4*.

The following Monday, January 6, 2003, Richards was terminated by Heeter. *Id.*

Richards filed a timely whistleblower complaint dated April 1, 2003 with OSHA under the Sarbanes-Oxley Act seeking all available compensatory damages, including back pay with interest, special damages, and litigation costs for alleged retaliatory termination. *Complaint* at 5. In May 2003, after filing the complaint, Richards changed his address to Prosperous Place, in Lexington, which is his business address.[9] *CXA4.*

On August 18, 2003, OSHA issued a determination letter stating that it was "not reasonable to believe that Respondent violated 18 U.S.C. Section 1514A." *RXA*. The determination letter was addressed to Richards at his old address. *RXA, CXA3*. However, the certified mail envelope shows that the old address was covered with a sticker that provided Richards' new (forwarding) address, and the envelope indicates that it was mailed on August 19, 2003 and returned to the sender unclaimed. *RXB.* The determination letter does not list Richards' attorney as a recipient, even though he signed the complaint. *RXA, Richards Depo., CX3 at 151.*

Based upon review of the certified mail envelope, Mr. William D. Rogers, letter carrier, testified during his deposition that he was unsuccessful in delivering the letter on August 25, 2003, and the first attempted delivery notice form was left in the post box of the Prosperous Place address, an office building with four units; the notice advised that the certified letter could be picked up at the post office. *Rogers Depo., RXC at 7*. Later, two additional notices of attempted delivery were placed in the post box.[10] *Id. at 6-7, 13.* After providing three notices for mail pickup, the U.S. Postal Service returned the letter to the sender on or about September 11th, 2003 as unclaimed. *Id.* at 11-12. The letter carrier stated that the notices were left in the post box of the Prosperous Place address, but he could not comment on whether Richards physically received the notices left at that address. *Id. at 17.*

Richards denies receipt of any notification from the Post Office concerning the certified letter from the Department of Labor relating to the OSHA determination. *CXA4*; *Richards Depo. CX3 at 151*.

Further, at Richards' deposition, Complainant's counsel, William Rambicure, Esq., denied that he was provided a copy of the determination letter. *Richards Depo., CX3 at 151.* The Whistleblower Investigator, Mr. Michael Moon, communicated with Mr. Rambicure regarding this matter and was aware that Richards was represented by counsel; however, counsel was not provided with a copy of the OSHA determination letter. *CXA2.*

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[9] Richards provided the U.S. Post Office with this forwarding address, which is the business office location of Community Management Associates.

[10] Under standard procedure, a second notice was delivered a week after the first, on or about September 1, 2003, and a third and final notice was also provided, although the date of the final notice was obscured. *RXB; Rogers Depo., RXC* at *6-7, 9-10*.

Richards and his counsel allege no knowledge of the OSHA determination letter until Richards was shown the letter by Lexmark's counsel during his April 19, 2004 deposition. *Richards Depo. CX3 at 151*.

Thereafter, by his counsel's letter of April 28, 2004, which was addressed to the Chief Administrative Law Judge and the Regional Administrator of OSHA, Complainant filed objections and a request for a hearing. The letter indicates that a "cc" was sent to Complainant but does not list other recipients. The envelope bears a post-mark of April 28, 2004 and the letter was file-stamped received in the Office of Administrative Law Judges on May 3, 2004.

SUMMARY JUDGMENT STANDARD

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, found at Title 29 C.F.R. Part 18, provide that an administrative law judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. §18.40(d); *see also* Fed. R. Civ. P. 56 (c).[11] Summary judgment is appropriate when the record "shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R.Civ.P. 56(c). When applying this standard, the evidence and reasonable inferences therefrom are considered in the light most favorable to the non-moving party. *E.g., Kendrick v. Penske Transportation Services, Inc.*, 220 F. 3d 1220 (10th Cir. 2000).

The party who files a motion for summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact concerning its claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, (1986). This burden may be met by showing that there is an absence of evidence to support the nonmoving party's case. *See Id*. Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

DISCUSSION

Respondent, in this case, has filed two Motions for Summary Judgment. The First Motion requested a dismissal based upon Complainant's failure to file timely objections, and the Second Motion requested a judgment as a matter of law based upon no genuine issue as to any material fact. Discussions of the two motions are outlined separately below.

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[11] Title 29 C.F.R. §18.1(a) provides that the Rules of Civil Procedure for District Courts of the United States shall be applied "in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation."

I. Timely Filing of Complainant's Objections

Under 29 C.F.R. §1980.106(a) any party who desires review, including judicial review, of the findings and preliminary order "must file any objections and a request for a hearing on the record within 30 days of **receipt** of the findings and preliminary order pursuant to §1980.105(b) [emphasis added]." The date of the postmark is deemed to be the date of filing. 20 C.F.R. §1980.106(a). Here, the OSHA determination letter was issued on August 18, 2003, and the letter was sent certified U.S. mail to Complainant's old address the following day; no copy was sent to his attorney. The certified letter was forwarded to Complainant's new (business) address, and a notice of attempted delivery was placed at that address on August 25, 2003 indicating that the letter could be picked up at the post office. However, although two additional notices were left at the new address, Complainant did not pick up the certified letter. Complainant and his counsel assert that they did not learn of the letter until April 19, 2004, when Complainant was questioned about it during his deposition, and they first received a copy at that time. The complaint was filed by mail on April 28, 2004, within nine days. The regulation under 29 C.F.R. §1980 is very clear that the thirty (30) day period for appeal begins to run upon receipt; while the Sarbanes-Oxley Act itself is silent, the AIR21 statute references "notification of findings."[12] Respondent argues that Complainant had notice and constructive receipt on August 25, 2003, when the delivery notification was left in the post box. However, the regulation requires "receipt" and not actual or constructive notice. *See* 29 C.F.R. §1980. Here, it is undisputed that Complainant did not receive the letter on August 25, 2003, and there has been no showing that he received the letter or other notification of the findings prior to April 19, 2004. Thus, the objections and hearing request filed on April 28, 2004 were filed within the thirty (30) day period, and the Complainant's objections were timely.

Presumptive Receipt/Actual or Constructive Notice

Respondent cites *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc*. 209 F.3d 552, 554 (6th Cir. 2000) as support for his position; however the facts are quite distinguishable. Moreover, *Graham-Humphreys* is a Title VII case operating under a different statutory and regulatory scheme. The pertinent provision in Title VII provides that the person aggrieved be notified if the government does not plan to pursue litigation and requires that a civil action be brought by such aggrieved person "within ninety days after the giving of such notice." 42 U.S.C. §2000e-5(f)(1). The regulations, however, require that the notice provide authorization for a civil action to be filed within ninety days of "receipt" of the authorization. 29 C.F.R. §1601.28(e)(1).

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[12] Complaints filed under the Sarbanes-Oxley Act are to be governed by the rules and procedures set forth in 49 U.S.C. §42121(b) [the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, also known as "AIR 21"]. 18 U.S.C. §1514A(b)(2)(A). The AIR21 Act provides that the complainant may file objections and a request for a hearing "[n]ot later than 30 days after notification of findings." 49 USC §42121.

In *Graham-Humphreys*, the postal carrier unsuccessfully attempted delivery of the EEOC's May 7, 1996 right to sue ("RTS") letter at the plaintiff's address.[13] The mailman then deposited, at that residence, an attempted delivery notification, which stated that a certified letter could be claimed at the local post office. *Id*. The plaintiff received the postal notification on that day, but she made no effort to retrieve the letter. *Id.* Later, the letter was returned to the EEOC office stamped "unclaimed." An EEOC employee alerted the plaintiff by telephone on May 20, 1996 that her RTS document had been issued and posted, but it had been returned as unclaimed certified mail. *Id.* at 554-55. Later that day, the plaintiff personally appeared at the EEOC district office to accept the letter, which advised her that she could bring an action within 90 days of receipt. *Id.* at 555. She filed an action on June 21, 1996, within 90 days of receipt of the letter but more than 90 days after she received the postal notifications. *Id.* Based on these facts, the U.S. Court of Appeals for the Sixth Circuit held that the complaint was untimely because (1) the plaintiff had presumptively received actual delivery of the RTS within five days of its mailing [March 13, 1996], and (2) the plaintiff received constructive receipt of notice of the RTS when the postal notification was placed in her mailbox [March 8, 1996]. *Id* at 558. In denying equitable tolling, the Sixth Circuit noted that the plaintiff had "abundant time (74 days)" following the "actual release to her of the RTS notice" prior to expiration of the limitations period. *Id.*

With respect to presumptive receipt, the Sixth Circuit in *Graham-Humphreys* relied upon a presumption of actual delivery and receipt within five days, which may be rebutted by proof that the plaintiff did not receive notification within that period. 209 F.3d at 557. The plaintiff had conceded that she received the notice and suspected that it related to her EEOC lawsuit authorization. *Id.* at 556-57. Here, in contrast, Richards has rebutted that presumption by asserting that he neither received the letter nor notice of the letter prior to April 19, 2004. In this regard, Richards denies having received the notice of attempted delivery and there are no facts demonstrating that he expected to receive it. Richards and his counsel allege no knowledge of, or physical possession of, the determination letter until Richards was shown the letter by Lexmark's counsel during his deposition of April 19, 2004. By viewing all evidence and drawing reasonable inferences in the light most favorable to the Complainant, I find that Complainant did not receive actual delivery or notice of the determination until April 19, 2004.

In *Graham-Humphreys*, the Sixth Circuit also stated that plaintiff had constructive notice of the right to sue letter on the day that the letter carrier deposited the first official notification at plaintiff's address advising that a certified letter was awaiting her at the postal office and that, even if she had not conceded her suspicions, she had received imputed notice of her RTS because she reasonably should have expected it to arrive during that time period. The Sixth Circuit held that "the deposit of a postal attempt-to-deliver advisory at the claimant's last know residential address of record within the five-day mailing interval ordinarily will constitute *constructive receipt* of the RTS notice by the claimant." 209 F.3d 558. In discussing the facts of the case, the Sixth Circuit referenced specific criteria relating to Title VII cases, noting that the RTS letter was sent in response to a request from the plaintiff and she expected to receive it in the mail, and she knew or should have known that it would be likely to be sent by certified mail. In this case, in contrast, Complainant has denied knowledge of or receipt of the attempted delivery notice. Although the letter carrier did state that the first notification was left on August

[13] The plaintiff had requested that the EEOC issue the letter on February 28, 1996.

25, 2003 in the post box of Complainant's forwarding address, there is no evidence that he physically received such notice. Moreover, Complainant had taken no contemporaneous action to initiate a response by OSHA and had no reason to expect that he would be receiving a determination letter during the pertinent time period. Therefore, constructive notice cannot be imputed to the Complainant.

Respondent also relies upon authority holding that a claimant who neglected to inform the EEOC of a change of address cannot overcome the presumption of delivery by mail, even if the notice is sent to the wrong address. *Respondent's First Motion for Summary Judgment* at p. 5*, citing Banks v. Rockwell Int'l N. Am Aircraft Operations,* 855 F.2d 324, 326 (6th Cir. 1988) and *Hunter v. Stephenson Roofing, Inc.,* 750 F.2d 472-475 (6th Cir. 2000). However, the issue in this case is one of receipt and not one of the incorrect address. Richards did provide the U.S. Postal Service with a new forwarding address, which was the location where the notification was placed. Thus, the Respondents' argument that Richard had constructive notice due to his failure to provide OSHA with his new address fails.

In view of the above, I find that the Complainant's hearing request was timely.

Respondent also argues that Complainant is not entitled to invoke equitable tolling of the limitations period because of his failure to exercise due diligence and his representation by counsel. *Respondent's First Motion for Summary Judgment* at p. 6 to 8. I do not find the circumstances present here to preclude the application of equitable tolling principles on any of the bases suggested. However, inasmuch as I have found the hearing request to be timely, it is unnecessary to address the issue of equitable tolling with respect to the timeliness of the hearing request. The issue of equitable tolling as related to the defective service of the hearing request is addressed below.

Defective Service of Objections and Hearing Request

Under 20 C.F.R. §1980.106(a), "copies of the objections [filed with the Chief Administrative Law Judge] must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, and the Associate Solicitor. . ." Respondent asserts that the objections indicate that neither Lexmark nor Lexmark's counsel were copied and Lexmark only received a copy weeks after they were filed. *Respondent's First Motion for Summary Judgment* at p. 3-4. Respondent argues that the claim should be dismissed on that basis. In response, Complainant concedes that Respondent and its counsel were not copied but asserts that the determination letter did not advise him of this requirement and that Respondent has not been prejudiced by the oversight. *Complainant's Response to [First] Motion for Summary Judgment* at p. 5 to 6.

Procedural requirements relating to the filing of a hearing request have generally been found to be not jurisdictional in nature and therefore subject to principles of equitable tolling. *See, e.g., Shelton v. Oak Ridge National Laboratories,* ARB No. 98-1000, ALJ No. 1995-CAA-19 (ARB March 30, 2001) (affirming the administrative law judges' acceptance, as timely, of a

hearing request that was filed with the wrong office of the Department of Labor due to a clerical error).[14]

Individual administrative law judges have disagreed as to whether failure to comply with specific procedural requirements (specifically, the requirement that a hearing request be served upon the respondent) is grounds for dismissal of whistleblower complaints. *Compare Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.,* 2004-ERA-9 (ALJ Bullard, April 29, 2004) *with Hibler v. Exelon Nuclear Generating Co., LLC,* 2003-ERA-9 (ALJ Lesniak, June 5, 2004). In a Sarbanes-Oxley Act case addressing a complainant's failure to serve a hearing request on the respondent within the requisite 30-day period, Administrative Law Judge Stephen Purcell found that the period was subject to equitable tolling and that such tolling was appropriate because the complainant, who was unrepresented, had diligently pursued his appeal but was confused by the instructions given in the OSHA determination letter.[15] *Lerbs v. Buca di Beppo, Inc.,* 2004-SOX-8 (ALJ, Dec. 30, 2003) Order Denying Motion to Dismiss at 4 to 5 *citing Spearman v. Roadway Express, Inc.,* No. 1992-STA-1 (Sec'y, August 5, 1992). Judge Purcell further noted that there had been no showing of prejudice as the respondent had not been hampered in any way in its ability to develop evidence or otherwise proceed with the litigation. *Lerbs,* at 5. *See also Graham-Humphrey,* 209 F.3d at 561, *citing Truitt v. County of Wayne,* 148 F.3d 644, 648 (6th Cir. 1998) (addressing criteria for equitable tolling).

In *Jain v. Sacramento Municipal Utility District,* 1989-ERA-39 (Sec'y, Nov. 21, 1991), a whistleblower case brought under the Energy Reorganization Act, the Secretary of Labor affirmed the administrative law judge's denial of a motion to dismiss based upon the complainant's failure to serve the respondent with the hearing request. The Secretary held that failure to serve a party with a hearing request was not grounds for dismissal when any possible prejudice due to delay was precluded by a postponement of the hearing. In *Jain*, the Secretary did not find a need to reach the issue of equitable tolling in view of the Secretary's finding that no prejudice resulted from the delay in service. Although the precedential value of *Jain* has been questioned because the service requirement in the regulations was amended in 1998 to require contemporaneous service, I find that it still represents good law. *Compare Lazur v. U.S. Steel-Gary Works,* 1999-ERA-3 (ALJ Mosser May 18, 2000), *with Webb v. Numanco,LLC,* 1998-ERA-27 (ALJ Roketenetz July 7, 1998) *vacated*, ARB No. 98-149 (ARB Jan. 29, 1999).[16]

Thus, I find that regardless of how the issue before me is framed (either as the ramifications of failure to comply with a procedural requirement or the appropriateness of equitable tolling), the pertinent inquiry is whether the Respondent has been prejudiced in any way by improper service of the hearing request. This matter, which was originally scheduled to be heard in August 2004, has been continued once and is currently set for December 6 to 10, 2004. Thus, the parties have been provided with ample time to conduct discovery and develop

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[14] In *Shelton*, the undersigned administrative law judge adopted the Chief Administrative Law Judge's finding that the hearing request should be accepted as timely.

[15] The same instructions are involved here. While Complainant Richards is represented by counsel, I do not find that factor to be dispositive in view of the newness of the Sarbanes-Oxley Act and the pertinent implementing regulations.

[16] In *Webb*, the Administrative Review Board vacated the ALJ's decision at the parties' request for approval of a settlement agreement and did not address whether the service requirement was jurisdictional; however, the ARB implicitly acknowledged jurisdiction when it approved the settlement.

the evidentiary record. Respondent has asserted no prejudice nor is any apparent. Accordingly, I find that Complainant's failure to serve Respondent with its hearing request is harmless and is not grounds for dismissal.

For the reasons set forth above, I find that the First Motion for Summary Judgment is meritless and it is denied.

II. Genuine Issues of Material Fact

The whistleblower provision of the Sarbanes-Oxley Act, set forth at 18 U.S.C. §1514A, states, in pertinent part:

> No company with a class of securities registered under section 12 of Securities Exchange Act of 1934 (15 U.S.C. 781), [17]or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee --
>
> (1) to 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 section 1341 [fraud and swindles], 1342 [fraud by wire, radio or television], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-
> . . .
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) . . . .

18 U.S.C. §1514A.[18]

In a "whistleblower" case such as one brought under the Sarbanes-Oxley Act, an employee must establish by a preponderance of the evidence that: (1) the employee engaged in protected activity as defined by the Act; (2) the employer was aware of the protected activity; (3) the employee suffered an adverse employment action, such as discharge; and (4) circumstances exist which are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action.[19] *Collins v. Beazer Homes USA, Inc.,* No. 1:03-CV-1374-RWS, __ F.Supp.2d __, 2004 WL 2023716 (N.D.Ga. Sept. 2, 2004) (case brought under Sarbanes-Oxley Act); *Peck v. Safe Air International, Inc.,* ARB No. 02-028, ALJ No.

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[17] Complainant asserts that Lexmark is a company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 and Respondent has not disputed this. (Complaint, CXA1).

[18] The Sarbanes Oxley Act incorporates procedural provisions of the "AIR21" Act. See footnote 12 above.

[19] The regulations set forth essentially the same criteria to be addressed during the investigation phase of the case. 29 C.F.R. §1980.104(b).

2001-AIR-3 (ARB Jan. 30, 2004) (AIR21 case). *Accord, Dysert v. Sec'y of Labor,* 105 F.3d 607 (11th Cir. 1997); *Macktal v. U.S. Dep't of Labor,* 171 F.3d 323, 327 (5th Cir. 1999); *Bauer v. U.S. Enrichment Corp.,* ARB No. 01-056, ALJ No. 2001-ERA-9 (ARB May 30, 2003) (ERA cases). *See also Bartlik v. U.S. Department of Labor,* 73 F.3d 100, 103 n. 6 (6th Cir. 1996) (listing different standards applied by Courts and finding "slight variation," in that "the common thread is that plaintiff must set forth facts which justify an inference of retaliatory discrimination").

A nexus between the protected activity and the adverse employment action may be established inferentially or directly. Proximity in time is sufficient to raise an inference of causation. 29 C.F.R. §1980.104(b); *Overall v. Tennessee Valley Authority,* ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-53 at 12 (ARB April 30, 2001). When a respondent has articulated a nondiscriminatory basis for its action, the inference of discrimination disappears, and the complainant must then demonstrate that the reasons proffered by the respondent were not the true basis for the adverse action, but were a pretext for discrimination, under the framework of proof for title VII cases. *Overall, supra.* If the employer has established legitimate reasons and the complainant also proves illegal motive, the case is a "dual motive" or "mixed motive" case, and the burden shifts to the respondent to demonstrate by clear and convincing evidence that it would have taken the same action in the absence of protected activity. *Talbert v. Washington Public Power Supply Systems*, ARB No. 96-23, ALJ No. 1993-ERA-35 (ARB Sept. 27, 1996). *But cf. Desert Palace dba Caesar's Palace Hotel & Casino v. Costa*, 539 U.S. 90 (2003) (direct evidence of discrimination is unnecessary to obtain a mixed-motive jury instruction in a Title VII case).

When a whistleblower case under the Sarbanes Oxley Act proceeds to a formal hearing before an Administrative Law Judge, a complainant must demonstrate by a preponderance of the evidence that protected activity was a contributing factor in the unfavorable action alleged in the complaint. 29 C.F.R. 1980.109(a). *See also Trimmer v. U.S. Dep't of Labor,* 174 F.3d 1098, 1101-02 (10th Cir 1999) (ERA case). Once a complainant meets this burden, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. 1980.109(a); *see also Trimmer* at 1102. While not defined in the statute, courts have characterized clear and convincing evidence as a heightened burden of proof – more than a mere preponderance of the evidence but less than evidence meeting the "beyond a reasonable doubt" standard. *Remusat v. Bartlett Nuclear, Inc.*, No. 1994-ERA-36 (Sec'y Feb. 26, 1996) *citing Yule v. Burns International Security Service*, No. 1993-ERA-12 (Sec'y, May 24, 1995). *See also White v. Turfway Park Racing Ass'n*, 909 F.2d 941, 944 (6th Cir. 1990), *citing Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Protected Activity

"Protected activity" as defined under the Act includes providing to an employer information regarding any conduct which employee reasonably believes constitutes a violation of various fraud provision of Title 18 of the U.S. Code (§ 1341, 1343, 1344, or 1348), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. §1514A (a)(1); *see also* 29 C.F.R. §1980.102(a). Under this statute, it is only necessary

to allege that the complainant "reasonably believed" the respondent violated one of the enumerated provisions.

The protected activity claimed here involves an inventory project that Heeter assigned to Richards on or about December 16, 2002. The project related to reducing Lexmark's inventory investment and reducing obsolete inventory write-offs. On Friday, January 3, 2004 Richards met with Heeter to show his preliminary findings, which reflected that Lexmark had understated the number of days items remained in inventory. Richards explained to Heeter his opinion that such reporting methodology results in inventory misrepresentations in management reports. Construing the facts and inferences in Richards' favor, Richards engaged in protected activity when he provided information concerning accounting problems with inventory to Heeter and he reasonably believed that the irregularities constituted a violation of federal and state laws relating to fraud against shareholders.[20] Thus, I find that there is a factual issue as to whether Complainant meets the requirement of protected activity under §1514A of the Act.

Notice of Protected Activity

Assuming that Richards' reporting of his findings on the inventory project constitutes protected activity, it is clear that Lexmark was aware that Richards was engaged in protected activity. Under the terms of the Act, quoted above, it is sufficient for an employee to provide information regarding possible fraudulent conduct to a person with supervisory authority over the employee. On January 3, 2004, Richards communicated his findings regarding the accounting practices to his supervisor, Heeter. Richards' reporting of his concerns to Heeter on January 3, 2004 placed Respondent on notice of the protected activity. Accordingly, that communication satisfies this element of the prima facie case.

Adverse Employment Action

The Sarbanes-Oxley Act provides that an employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in terms and conditions of employment." 18 U.S.C. §1514A; *see also* 29 C.F.R. 102(a), (b)(1). Richards clearly suffered adverse employment action through his discharge on January 6, 2003.

Contributing Factor

A "contributing factor" has been defined as anything that tends to affect in any way the outcome of the decision. *See Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (decided under the Whistleblower Protection Act, 5 U.S.C. §1221(e)(1).) "Normally the burden [of making a prima facie showing under the Sarbanes-Oxley Act that the claimed activity was a contributory factor in the adverse personnel action] is satisfied . . . if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to an inference that it was a factor in the adverse action." 29 C.F.R. §1980.104(b)(2). *See also*

[20] In Respondent's Statement of the Issues and Position ¶3, filed on August 3, 2004, Respondent disputes that there were any accounting irregularities or that Richards' belief that there were any violations (including shareholder fraud or the violation of securities reporting requirements) was reasonable. However, Respondent has only sought summary decision based upon Complainant's failure to establish a causal relationship.

Kendrick, 220 F.3d at 1234 (42 USC § 1981 case) (inference of retaliatory motive may be shown by protected conduct closely followed by adverse action;).

Here, the proximity of time between the alleged protected activity and the adverse action clearly gives rise to an inference of causation. The fact that Complainant was terminated on the next business day after allegedly reporting accounting problems is sufficient to raise an inference that the adverse action was likely motivated by his protected activity.

Respondent argues that the decision to discharge Richards was made before the protected activity occurred, and thus the protected activity could not have been a factor in the decision and the Complainant cannot establish a casual relationship. In this regard, Respondent states that undisputed evidence establishes that the decision to terminate Richards' employment was made before the January 3, 2003 meeting between Richards and Heeter took place. While Respondent has provided evidence that management was unsatisfied with Richards' work performance and considering his possible termination, there are genuine issues of material fact on this point.

The exact date of the decision to terminate Richards is unclear and the evidence is contradictory on the point. Management did express some concern regarding Richards' future with Lexmark. While Lexmark argues that plans for Richards' termination were in progress by late November 2003, Complainant alleges that Covington informed him that she was very pleased with his work during the same time period. Further, while an e-mail dated October 28, 2003 from Covington to Heeter stated that Richards would be dismissed before the end of the year, Heeter maintains that the decision was not made until mid- or late November, and Richards was told during a November 11, 2003 meeting with Heeter that his job was not in jeopardy. The written records that have been submitted are vague and inconclusive. Copies of actual paperwork initiating Complainant's termination – which would have provided more definitive evidence that a decision to terminate Complainant had been finally made – are lacking. The evidence is compatible with the conclusion that a decision to terminate Complainant, while under consideration, had not been finalized.

The fact that Complainant's termination was the natural consequence of Lexmark's documented dissatisfaction with his work performance is not conclusive, because it is unclear whether his reporting of accounting problems the business day prior to his termination in any way factored into the decision. If Richards' communication with his supervisor on Friday, January 3, 2003 in any way affected the events regarding his termination, then the protected activity may also have been a contributing factor. By applying the summary judgment standard, which draws all reasonable inferences in the light most favorable to the non-movant, I find that there is a genuine issue of material fact as to whether Complainant's protected activity was a contributing factor in his termination.

Clear and Convincing Evidence

For the same reason, I find that Respondent has not established by clear and convincing evidence that it would have taken the same personnel action in the absence of the Complainant's protected activity. Specifically, Respondent has not established that the timing of the decision to

terminate him was not influenced by his alleged protected activity. Quite simply, there are material factual issues that will need to be resolved on a full evidentiary record.

CONCLUSION

In summary, both motions for summary decision must be denied. Respondent's First Motion for Summary Judgment is denied, because Complainant's objections were filed in a timely manner on April 28, 2004 based upon the actual receipt date of April 19, 2004 and Respondent was not prejudiced by any delay in service. With respect to Respondent's Second Motion for Summary Judgment, summary judgment in favor of Respondent is inappropriate in this matter because genuine issues of material fact exist regarding whether Richards' reporting of alleged accounting problems relating to inventory was a contributing factor in his termination. In addition, Complainant's Motion to Strike is moot based upon my findings with respect to the second summary judgment motion. This case will proceed to a hearing during the week of December 6, 2004.

ORDER

IT IS ORDERED that the Respondent's First and Second Motion for Summary Judgment be, and hereby are **DENIED** and

IT IS FURTHER ORDERED that the Complainant's Motion to Strike be, and hereby is, **DENIED**.

A
PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.