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: 23 December 2005

Case No.: 2005-SOX-00111

In the Matter of

BRIAN VODICKA
Complainant

v.

DOBI MEDICAL INTERNATIONAL, INC.
Respondent

RECOMMENDED DECISION AND ORDER
DISMISSING THE COMPLAINT

1. BACKGROUND

This proceeding arises from a complaint filed on July 13, 2005[1] by Brian Vodicka ("Complainant") against DOBI Medical International, Inc. ("Respondent" or "DOBI"). The complaint alleges that Respondent violated § 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, by filing a lawsuit in the state of New York against Complainant alleging that he violated his confidentiality agreement with Respondent. ALJX 1.[2] The applicable regulations are contained in 29 C.F.R. Part 1980.

In a letter dated September 9 the Occupational Safety and Health Administration (OSHA) dismissed the complaint, essentially finding that the New York court in which Respondent had filed the lawsuit "has jurisdiction to hear and decide" the merits of Complainant's contention "that having to defend a law suit in New York is an unfavorable personnel action." ALJX 2, p. 2. On September 9 this case was referred to the Office of Administrative Law Judges (OALJ).[3]

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[1] All dates herein are in the year 2005 unless otherwise stated.

[2] "ALJX" refers to Administrative Law Judge's Exhibit. "RX" refers to Respondent's Exhibit. Respondent filed a total of seven exhibits in two segments on October 24 and November 14. Complainant filed Exhibits A through D with his complaint. Complainant subsequently filed an exhibit entitled "Pump and Dump" with parts A through V, as well as additional documents under Exhibits A through Q.

[3] It is unclear why OSHA referred the case to OALJ on the same date that OSHA denied the complaint, and prior to any request for a hearing.

ALJX 3. On September 26 Complainant filed a timely request for a formal hearing. ALJX 4. Subsequently the case was assigned to me to hear and decide.

A formal hearing before me was scheduled to commence on November 8. On October 13 Complainant requested a postponement of the hearing until January or February 2006. On October 24 Respondent filed a motion for a summary decision dismissing the complaint. The hearing therefore was cancelled.

In its motion for summary decision, Respondent argues that Complainant was a member of its board of directors and therefore was not an employee who is protected under § 806 of the Act. In addition, Respondent contends that it did not retaliate against Complainant due to protected activities, and that it filed the lawsuit against him in the New York Supreme Court, seeking only injunctive relief, "simply . . . to force [Complainant] to comply with his contractual and common law duties to return [its] confidential documents to [it] and to prevent any wrongful disclosure of these documents." Respondent's motion, pp. 3, 6.

My Order of October 25 provided a schedule for Respondent to "file further argument supporting its contention that Complainant is not protected by the Act because he was a director and not an 'employee' of Respondent," and for Complainant to "file a complete response to Respondent's motion to dismiss the complaint." On October 26 I issued an Order which, *inter alia*, directed Complainant to state whether he agreed with OSHA's finding in its September 9 letter that he "voluntarily resigned from [Respondent's] Board [of Directors] on February 5, 2005." On November 1 I issued an Order which, *inter alia*, requested the parties to address the additional questions of whether:

> (1) the Act's 90-day statute of limitations bars Complainant from alleging that his resignation as a director of Respondent constitutes a violation of the Act,
>
> (2) the Act's statute of limitations bars the allegations in Complainant's letter dated October 13 that Respondent also violated the Act by its "threat to 'bury me' and to put unfavorable memos in the file concerning my activity as a [Respondent] director" (ALJX 5), and
>
> (3) filing a lawsuit against an employee alleging breach of a confidentiality agreement may constitute an adverse employment action that is prohibited by § 806(a).

Respondent and Complainant filed their responses on November 14 and December 12, respectively.

II. STANDARD OF REVIEW

The standard for granting summary decision is set forth in 29 C.F.R. § 18.40(d), which provides that summary decision may be granted

> 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.

The standard for granting summary decision is essentially the same as that in Fed. R. Civ. P. 56, governing summary judgment in the federal courts. "A material fact" under § 18.40(d) is one whose existence affects the outcome of the case. A "genuine issue" under § 18.40(d) exists when the nonmoving party (or the party against whom summary decision is being considered) produces sufficient evidence of a material fact so that a factfinder is required to resolve the parties' differing versions at trial. Sufficient evidence is any significant probative evidence. Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. The non-moving party may not rest upon mere allegations, speculations, or denials in his pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. If the non-moving party fails to sufficiently show an essential element of his case, there can be "'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Reddy v. Medquist, Inc., ARB Case No. 04-123, ALJ Case No. 2004 SOX-35, slip op. at 4-5 (ARB Sept. 30, 2005)(citing, *inter alia*, Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)).

Accordingly, I shall grant summary decision if, upon review of the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party – Complainant – I conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact. Reddy, supra, slip op. at 5.

I review and decide this matter *de novo*. 29 C.F.R. § 1980.107(b).

III. DISCUSSION

This case does not involve any disputed relevant facts (in contradistinction to the question of the legal significance of the relevant facts). In considering whether summary decision against Complainant should be granted, I fully accept as true Complainant's version of the relevant facts (but not necessarily their legal significance)[4] which he has set forth in his Brief dated December 12.

Complainant's recitation of the facts, in 11 numbered paragraphs, is herewith set forth verbatim (Complainant's December 12 Brief, pp. 1-2):

"1. On October 7, 2004, Mr. Vodicka joined Dobi's board of directors;

"2. Mr. Vodicka was compensated for his service as a Dobi director via stock options

[4] For example, I need not and do not accept as true Complainant's characterization of the temporary restraining order Respondent obtained against Complainant as being "overbroad and all encompassing." December 12 Brief, p. 2, ¶ 9.

and payments per calendar quarter, per board meeting, and per board subcommittee meeting, earning approximately $4,000 for services rendered between October 7, 2005, and February 2, 2005. (See Dobi's November 14, 2005, letter brief at p.4.)

"3. At a special meeting of Dobi's audit committee on January 25, 2005, Mr. Vodicka brought to the attention of nonmanagement committee members (and not for the first time) the SOX violations he complains of herein, and tendered his resignation from the Dobi board of directors. (See Exhibit C-24, Affidavit of Brian Vodicka.) That night, the Chairman of the Audit Committee warned Mr. Vodicka that because of his allegations of SOX violations the Chairman and General Counsel had stated that "they would bury him [Vodicka]" and were placing memos in their files of supposed conversations with Vodicka. The Chairman of the Audit Committee warned Mr. Vodicka to "watch these guys." *(See* Exhibits B, BV-2199, BV-2207, BV-2206 and BV-2205.)

"4. Both before and after resigning from the Dobi board, Mr. Vodicka sought legal counsel for advice on obligations under SOX and the Securities Exchange Act. Other Dobi Board Members, and upon information and belief, management was at the time aware that Mr. Vodicka was consulting with legal counsel on these issues. (See Exhibit C-24.)

"5. Mr. Vodicka resigned on February 2, 2005. (See Exhibit C-24.)

"6. DOBI filed the lawsuit styled *Dobi Medical International v. Brian Vodicka,* No. 601 348/05 in New York State court on April 15, 2005.

"7. On May 13, 2005, Mr. Vodicka made a formal demand upon DOBI's C.E.O. Phillip Thomas to "come clean" with the truth about DOBI's clinical testing results of its machine. (See Exhibit C-36.)

"8. On May 26, 2005, DOBI secured a Temporary Restraining Order prohibiting Vodicka from "disclosing all or any portion of the confidential information which Vodicka received from DOBI in his capacity as a member of its board of directors pending the entry of final judgment herein...."

"9. Due to the overbroad and all encompassing Temporary Restraining Order obtained against Vodicka, Vodicka could not file a SOX complaint with OSHA, report to the Securities and Exchange Commission, or report to any other law enforcement or regulatory agency the violations of SOX and state and federal securities laws of which he had become aware prior to, and subsequent to, resigning from the DOBI board. The temporary restraining order obtained ex-parte expressly prohibited the affirmative actions legal counsel advised Vodicka that he had to take to discharge his duties imposed under the law.

"10. Following a hearing on July 8, 2005, and by order dated July 11, 2005, the New York court entered a preliminary injunction but modified its injunctive order to permit Mr. Vodicka to use the Dobi confidential information in regulatory filings with the SEC and OSHA. (See Exhibit General "K".)

"11. Mr. Vodicka thereafter, on July 13, 2005, initiated this OSHA proceeding to report perceived violations of SOX and other laws."

The question of whether a member of a corporation's board of directors is a protected employee under § 806(a) is not decided in this ruling.

As noted, Respondent contends that the complaint should be dismissed because Complainant was a member of its board of directors and directors are not protected employees under § 806(a).

Section 806(a) and 29 C.F.R. § 1980.102 prohibit covered employers from retaliating against "an employee" or "any employee" because the employee engaged in protected activity. In the instant case, Complainant's sole role or status vis-à-vis Respondent was as a member of the latter's board of directors. The Act and regulations are silent about whether a director is a protected "employee."

The question of whether a person would qualify as a protected "employee" under the Act where his sole relationship with a covered employer is as a member of its board of directors appears to be an issue of first impression. The parties have cited no precedent and I have found none that directly answers this question. It is an interesting and difficult issue, as corporate officers have been held to be employees under the Sarbanes-Oxley Act, but directors are a different genus of corporate creature than both officers and those who clearly are employees. Further, if Congress had intended to enact protection for whistleblowing directors, it could have specifically named them in the Act. On the other hand, there are salutary policy reasons to protect the public by protecting directors who "blow the whistle."

However, as I shall grant summary decision and dismiss the complaint on other grounds that constitute an "essential element" of Complainant's case, thus finding that there is no genuine issue as to any material fact, I need not resolve the corporate director question.[5]

Complainant's allegations that Respondent acted against him by threatening to "bury him," threatening to place unfavorable memos about him in Respondent's files, and causing his resignation from the board are barred by the statute of limitations.

Complainant became a member of Respondent's board of directors on October 7, 2004. Thereafter Complainant vigorously complained to officers and directors of Respondent about a number of corporate matters. Complainant alleges that on January 25 the chairman of Respondent's audit committee warned him that earlier on that date Respondent's chairman and Respondent's general counsel had threatened to "bury" Complainant and the general counsel

[5] Absent the clear need to enter into this *terra incognita*, I decline to do so. Further, if this case should go to the Administrative Review Board (ARB) and it overruled my dismissal of the complaint, the ARB then could resolve the corporate director issue for reasons of administrative economy and consistent with its policy to decide legal questions de novo. Reddy, supra, slip op. at 4.

stated he was placing memos "in a file of conversations he 'supposedly' had with [Complainant]." One week later, on February 2, Complainant resigned from the board of directors. ALJX 1, p. 2; Complainant's December 12 Brief, pp. 1-2, ¶¶ 3, 5.

Complainant alleges that the threats to "bury him" and to place unfavorable memos in his file, as well as his resignation from the board, violate the Act. As discussed below, presumably Complainant would posit that his resignation constituted a constructive discharge.

The Act at 18 U.S.C. § 1514A(b)(2)(D) states:

> **Statute of Limitations.** An action under paragraph (1) [i.e., filing a complaint alleging discrimination] shall be commenced not later than 90 days after the date on which the violation occurs.

The regulation at 29 C.F.R. § 1980.103 states:

> **Filing of discrimination complaint.**
>
> (d) Time for filing. 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), an employee who believes that he or she has been discriminated against in violation of the Act may file . . . a complaint alleging such discrimination . . . .

The Department of Labor's commentary on § 1980.103 states:

> To be timely, a complaint must be filed within 90 days of when the alleged violation occurs. Under Delaware State College v. Ricks, 449 U.S. 250, 258 (1980), this is considered to be when the discriminatory decision has been both made and communicated to the complainant. In other words, the limitations period [i.e., the 90 days] commences once the employee is aware or reasonably should be aware of the employer's decision. Equal Employment Opportunity Commission v. United Parcel Service, 249 F.3d 557, 561-62 (6th Cir. 2001) . . . .

69 Fed. Reg. No. 163, p. 52106 (August 24, 2004).

As the complaint was filed on July 13, Complainant is barred from complaining of any discrete adverse employment action against him by Respondent that occurred on or before April 13. My Order of November 1 apprised the parties of this. However, Complainant's subsequent brief does not address the statute of limitations bar, other than to express the following argument:

> [Complainant] respectfully submits that his February 2, resignation was part and parcel of Dobi's (sic) efforts to conceal SOX

> violations and threaten or harass [him] under the terms of his confidentiality agreement with DOBI that resulted in the filing of the gag lawsuit, and therefore should not be barred by limitations (sic).

Complainant's December 12 Brief, p. 3. Considering this statement in the most favorable light, I shall assume that Complainant contends that the statute of limitations should not bar his allegation that his resignation on February 2 was a constructive discharge resulting from Respondent subjecting him to a hostile work environment that continued into the 90-day period that commenced on April 13.

Under the hostile work environment concept enunciated in National Railroad Passenger Corporation v. Morgan, 536 U.S. 101 (2002) (a race discrimination case under Title VII), a hostile work environment is actionable from its inception even though some of the component acts fall outside the statutory period, so long as one of the constituent acts falls within the time period. Morgan stated:

> A hostile work environment claim is comprised of a series of separate acts that collectively constitute one "unlawful employment practice" [under Title VII]. The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

Id. at 117. On the other hand, Morgan also stated:

> A discrete retaliatory or discriminatory act "occurred" on the day that it 'happened." A party, therefore, must file a charge within [the prescribed number of days in the pertinent statute of limitations] or lose the ability to recover for [a discrete retaliatory or discriminatory act].

Id. at 110. So what is the difference between a "discrete" discriminatory act and a "hostile work environment?" The Court stated that easily identified "discrete acts" include termination, failure to promote, denial of transfer, and refusal to hire, and that [e]ach [discrete] incident of discrimination or retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice'." Id. at 114. Hostile work environment cases are further described by the Court as follows:

> Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct . . . . It occurs over a

> series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own . . . . As we pointed out in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986), mere utterance of an . . . epithet which engenders offensive feelings in an employee . . . does not sufficiently affect the conditions of employment to implicate Title VII. . . . Such claims are based on the cumulative effect of individual acts.

Id. at 115 (internal quotation marks omitted). The Court went on to state:

> In determining whether an actionable hostile work environment claim exists, we look to all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23. (1993).

Id. at 116 (internal quotation marks omitted).

Bearing in mind the Morgan precepts and the fact that the 90-day statute of limitations in the Act in this case bars allegations of discrete acts that occurred on or before April 13, 2005, we turn to Complainant's allegations of prohibited conduct by Respondent. These consist of four acts:

- On January 25 Respondent made a threat to "bury him."
- On January 25 Respondent made a threat to place unfavorable memos about Complainant in its files.[6]
- On February 2 Complainant was constructively discharged.
- On April 15 Respondent filed a lawsuit against Complainant.

Only the filing of the lawsuit on April 15 occurred within the period of the statute of limitations. Leaving aside the matter of whether any of the pre-April 13 acts is a "discrete" act that is actionable under § 806, and assuming without finding that Respondent's alleged acts were hostile to Complainant, the question is whether the four acts are actionable as component parts of a "hostile work environment" to be treated as a single act ending with the filing of the lawsuit. This turns on whether, in the terminology of Morgan, the harassing acts were "repeated conduct . . . that occur[red] over a series of days or perhaps years." I find that the four acts do not constitute a hostile work environment. The first two occurred on the same date, January 25. The

[6] Complainant learned of the two threats that occurred on January 25 later on that date.

third occurred a week later on February 2. Even if I were to conclude that the filing of the lawsuit on April 15 is a prohibited act, the "hostile" acts total only four in number.[7] Further, there were no hostile acts against Complainant for ten weeks (February 3 to April 15) out of the eleven-week period from January 25 to April 15.

In light of the foregoing, the acts that occurred on January 25 and February 2 are barred from being alleged as violations of the Act by the statute of limitations.[8]

The lawsuit Respondent filed against Complainant is not an adverse employment action and therefore it did not violate the Act.

My prior rulings leave the allegation that Respondent's lawsuit against Complainant violated the Act as the only allegation of prohibited retaliation under § 806 that is not barred by the statute of limitations.

The core of Respondent's lawsuit against Complainant is the agreement he signed on August 25, 2004, entitled "Confidentiality and Non-Disclosure Agreement" (the "Agreement"). RX 4. Complainant's essential commitment in the Agreement is that he will not disclose Respondent's "Confidential Information" for a period of two years from the date of its disclosure to him or two years from his last communication or contact with Respondent, whichever is later. RX 2, ¶ 4. The Agreement contains limited exceptions to Complainant's nondisclosure obligation, including an exception for matter requested by a subpoena from a "governmental body" where "in the opinion of counsel, [Complainant] is required to disclose." RX 4, ¶ 8.

Respondent filed the lawsuit against Complainant on April 15, 2005 in the Supreme Court of New York.[9] RX 2. The complaint alleges, in pertinent part, that "[Complainant] is in possession of highly sensitive and proprietary internal DOBI confidential information which he failed to return to DOBI upon his resignation from its board of directors" in violation of the Agreement. RX 2, ¶¶ 5, 13-17. The complaint also alleges that "[Complainant] has disclosed and, upon information and belief, continues to disclose DOBI's confidential information to past, current and prospective investors in DOBI and to other third parties." RX 2, ¶ 24. The remedy sought by Respondent includes preliminary and permanent injunctive relief requiring Complainant to return all confidential documents and preventing him from disclosing any

[7] As set forth below, I find that the lawsuit does not constitute an adverse employment action under the Act. In that case, even if there was a hostile work environment none of Respondent's prohibited acts occurred within the 90-day statute of limitations period, a prerequisite for a viable complaint.

[8] Complainant has not argued that the statute of limitations should be tolled, and I find no reason why it should be.

[9] Although Complainant is a resident of Texas, Respondent is incorporated in Delaware, and Respondent's principal place of business is in New Jersey, the lawsuit was brought in New York. The lawsuit notes that the Agreement vests jurisdiction "in the applicable federal and state courts in New York, NY." RX 4, ¶ 13; RX 2, ¶ 1.

confidential documents. RX 2, ¶¶ 32, 39, 44, 49. The complaint does not seek monetary damages from Complainant. However, the concluding paragraph of the complaint requests the court to enter judgment

> For such other and further relief as is just and proper, including but not limited to an award of all costs, expenses and legal fees incurred in the prosecution of this action.

On May 26 Respondent moved the New York court for a preliminary injunction, which was granted on that date. The record in the instant case does not contain a copy of the court's ruling, but Complainant states without contradiction by Respondent that on May 26 the court issued a temporary restraining order prohibiting Complainant from "disclosing all or any portion of the confidential information [he] received from DOBI in his capacity as a member of its board of directors pending the entry of final judgment herein . . . ." Complainant's December 12 Brief, ¶ 8.

On July 8 the New York court conducted a second hearing on Respondent's motion for preliminary injunction. On July 11 the court issued a temporary order requiring Complainant to return to DOBI all documents covered by the confidentiality agreement, except for

> one set of documents to be held in escrow by Complainant's New York attorney and to [be] used only as attachments to pleadings in [Complainant's] securities fraud litigation in Texas, and as attachments to regulatory filings with the Securities and Exchange Commission and the Occupational Safety and Health Administration.

RX 3.

Section 806(a) prohibits the following means of retaliation against an "employee," stating that an employer may not

> discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee **in the terms and conditions of employment.** (Emphasis supplied.)

Further, the regulations promulgated under the Act at 29 C.F.R. § 1980.102 provide as follows:

> Obligations and prohibited acts
>
> (a) No company . . . may discharge, demote, suspend, threaten, harass or in any other manner discriminate against any employee **with respect to the employee's compensation, terms, conditions, or privileges of employment** . . . . (Emphasis supplied.)

> (b) A company . . . is deemed to have violated the Act if it intimidates, threatens, restrains, coerces, blacklists, or in any other manner discriminates against an employee **in the terms and conditions of employment** . . . . (Emphasis supplied.)

In his complaint filed with OSHA on July 13 Complainant makes several arguments in support of his contention that Respondent's lawsuit against him violated the Act. First, he states, "I assert that having to defend a lawsuit in New York is an unfavorable action." ALJX 1, p. 3. Further, in the concluding paragraph of the complaint Complainant characterizes the lawsuit as "the harassment/intimidation lawsuit." ALJX 1, p. 4. Subsequently, Complainant argues that,

> The "gag" lawsuit that was filed in May 2005 (sic) itself constitutes an unlawful effort to '"threaten, harass, or in any other manner discriminate against [him] in the terms and conditions of his employment."

This contention is based on Complainant's assertion that the temporary restraining order prohibited him "from reporting DOBI's actions against [him] as [a] whistleblower until after the injunctive order was modified on July 11, 2005." Complainant's December 12 Brief, p. 4. Second, with regard to the fact that Complainant resigned from his position of a corporate director three months before the lawsuit was filed, Complainant points out that the regulation at § 1980.101 defines "employee" as "an individual presently or formerly working for a company . . . ."

Complainant's argument that Respondent violated the Act by filing the lawsuit against him is conclusory and unpersuasive. Complainant fails to address in any meaningful way the requirement that an employer's conduct that violates the Act must adversely affect the employee's "terms and conditions of employment" or his "compensation" or his "privileges of employment." In the instant case it is clear that, even had Complainant been an employee of Respondent when it filed the lawsuit on April 15, 2005, the lawsuit would not have directly affected any aspect of his employment.[10] The only precedent I have found that considered an employer's lawsuit in the context of an allegation of employment discrimination is inapposite. In Durham Life Insurance Company v. Evans, 166 F.3d 139 (3d Cir. 1999) (a sex discrimination case under Title VII), after the employee (a life insurance salesperson) resigned (the court found that she had been constructively discharged) the employer sued her for violation of a noncompete agreement. The Third Circuit stated:

> Post-employment actions by an employer can constitute discrimination under Title VII if they hurt a plaintiff's employment prospects. (Case citations omitted.) The lawsuit against Evans and the complaints [about her] to the Insurance Department had the

[10] At a number of places in his argument, Complainant appears to conflate his allegedly "protected activity" under the Act with the type of retaliation that is prohibited. My decision in this case in no way determines whether or not Complainant was engaged in protected activity. Rather, for the purposes of this determination I have assumed that Complainant engaged in protected activity under the Act, 18 U.S.C. § 1514A(a)(1) and (2), and that Respondent had knowledge of the protected activity when it occurred.

> potential to affect her ability to sell insurance . . . . This kind of threat to Evans's livelihood is sufficiently employment-related to be an employment action. See Charlton v. Paramus Bd. Of Educ., 25 F.3d 194, 198 (3d Cir. 1994), (post-employment threat to a teacher's license constitutes employment action).

166 F.3d at 157. It is quite clear that in Durham Life Insurance Company the employer's post-employment lawsuit by which it sought to prevent the employee from competing against it had the potential to directly affect her employment prospects. Similarly, giving a former employee a negative employment reference or "blacklisting" a former employee, in retaliation for engaging in protected activity, would constitute prohibited employer actions under the Act because they could affect the employee's future employment prospects or the terms or conditions of such employment. Robinson v. Shell Oil Company, 519 U.S. 337 (1997) (a case under Title VII). The lawsuit in the instant case is quite different than that in Durham Life Insurance Company. Here the lawsuit sought to enforce the confidentiality agreement by compelling Complainant to return confidential documents to Respondent and requiring him not to disseminate confidential information to other persons. Complainant has provided no explanation as to how this lawsuit could affect his ability to obtain future employment or the terms or conditions of such employment, and I can think of none.

Granting that Respondent's lawsuit against Complainant caused him to expend a considerable amount of money in defending against it, I find that Complainant's contention that the lawsuit violates the Act is without merit.

IV. CONCLUSION

Based on the foregoing, I find that Complainant has failed to establish that the putatively prohibited actions of Respondent that occurred prior to the 90-day period in the statute of limitations are not barred by the statute of limitations. Although Complainant is not barred by the statute of limitations from alleging that the lawsuit that Respondent filed against him violates § 806, I further find that he has failed to establish that the lawsuit is a prohibited adverse employment action under § 806.

Accordingly, there is no genuine issue as to any material fact, and Respondent is entitled to summary decision. Consequently, the complaint must be dismissed.

ORDER

It is ORDERED that the complaint herein is dismissed.

A

Robert D. Kaplan
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, 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).