U.S. Department of Labor

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Issue Date: 21 July 2004

Case No.: 2004-SOX-00057

In the Matter of

STUART N. KINGOFF
Complainant

v.

MAXIM GROUP LLC
Respondent

RECOMMENDED DECISION AND ORDER
DISMISSING THE COMPLAINT

Background

This proceeding arises from a complaint filed on March 30, 2004 (ALJ 1)[1] by Stuart N. Kingoff (Complainant) against Maxim Group LLC (Respondent or Maxim), alleging 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 causing his constructive discharge from employment with Maxim on October 2, 2003. The applicable regulations are contained in 29 C.F.R. Part 1980. All dates herein are in the year 2004 unless otherwise indicated.

In a letter dated May 6 the Occupational Safety and Health Administration (OSHA) denied the complaint because it was untimely. (ALJ 2) On June 1, 2004 Complainant requested a formal hearing. (ALJ 3) Subsequently the case was assigned to me to hear and decide. On June 8 I issued an "Order to Show Cause Why the Complaint Should Not be Dismissed as Untimely" (ALJ 4) requiring Complainant to show cause why the complaint should not be dismissed pursuant to the Act at 18 U.S.C. § 1514A(b)(2)(D), and the pertinent regulation, 29 C.F.R. § 1980.103, because the complaint was filed more than 90 days after the date of his constructive discharge.

Complainant responded to the Order to Show Cause in a letter dated June 14 (ALJ 5). In this document Complainant makes three arguments:

"1) Each event starts an accrual of the statute of limitations.

[1] The abbreviation "ALJ" denotes an exhibit so marked by the undersigned.

"2) Equity demands that Maxim be held liable for Sarbanes-Oxley violations.

"3) The Department of Labor is best able to hold a Sarbanes-Oxley hearing."

Under point 1, Complainant states that in addition to constructively discharging him on October 2, 2003, Maxim filed an arbitration action against him with which he was served in February 2004, within the 90-day statute of limitations period. Further, Complainant asserts that Maxim sent him "numerous correspondence" within the 90-day limitations period. Under point 2, Complainant seeks "my day in court" for Maxim's continuing "egregious actions against me." Under point 3, Complainant argues: "Despite the possibility of this case (and many other Maxim violations) being held in other forums, the DOL is best able to evaluate Sarbanes-Oxley violations."

In Maxim's responsive letter dated June 25 (ALJ 6), it makes the following assertions:

- The arbitration case to which Complainant refers is Maxim Group LLC v. Stuart Kingoff, NASD Case No. 03-08977. Contrary to Complainant's contention that he was served with the notice of arbitration in February 2004, the NASD notification of Maxim's having filed a claim against Complainant for arbitration with NASD was mailed to Complainant on December 23, 2003. A copy of the NASD letter dated December 23, 3003 is attached to ALJ 6.

- Maxim's correspondence to Complainant to which he refers was sent in response to his prior correspondence to Maxim.

In a letter dated July 7 (ALJ 7) Complainant reiterated that he was served with the NASD notice in February 2004 (rather than December 2003), and questioned how Maxim came into possession of the letter addressed to him. Finally, Complainant's letter also avers that Maxim sent him a promissory note, and a "Confession of Judgment which they tried to force me to sign."

In a letter dated July 9 (ALJ 8) Maxim pointed out that the December 23, 2003 NASD letter indicates that a copy was sent to Maxim. In the July 9 letter Maxim concedes that it had sent Complainant a promissory note previously entered into by him and Maxim, but states that the note was forwarded to Complainant based on the request in his letter dated March 23, 2004 for "Loan Documents" (copy attached to ALJ 8).

In a letter dated July 13 (ALJ 9) Complainant stated that he "received service of the arbitration on March 10, 2004 … (not February as … previously stated)."[2] Complainant also stated: "I amend my complaint to include this action of Maxim." The letter concludes by stating that "this action under the Act is not barred by the statute of limitations."

[2] In this letter Complainant asserts that the NASD notice dated December 23, 2003 does not contain his address. However, the second page of the notice contains an address for Complainant in Wesley Hills, New York.

In a letter dated July 15 (ALJ 10) Maxim reiterated that the NASD letter of December 23, 2003 was sent to Complainant on December 23, 2003.

Findings of Fact and Conclusions of Law

In the vernacular, the Act protects "whistleblowers" from adverse employment actions by their employers due to the employees' whistleblowing activities related to corporate fraud. Specifically, the Act, 18 U.S.C. § 1514A(a), in pertinent part provides that certain publicly traded companies may not

> 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 … regarding any provision of Federal law relating to fraud against shareholders…; or
>
> (2) to file … or otherwise assist in a proceeding related to an alleged violation … relating to fraud against shareholders.

With regard to the time within which a complaint alleging a violation of the Act must be filed, 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 provides:

> **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. . .

In the instant case, there is no question that the complaint filed on March 30 alleging that Maxim constructively discharged Complainant on October 2, 2003 is barred by the 90-day statute of limitations. The time for filing that complaint expired on January 2.[3] Stated another way, the complaint filed on March 30, 2004 would not be timely with regard to an adverse employment action that occurred on or before December 31, 2003.

[3] Complainant has not averred that the statute of limitations should be tolled or provided information that would support such a determination.

The remaining issue before me is whether the October 2, 2003 complaint can support Complainant's subsequent allegations that Respondent committed other acts against Complainant that adversely affected his employment: forcing him to execute a promissory note, filing an NASD claim against him for arbitration, sending him correspondence that, presumably, is threatening or harassing, and other "egregious [but unspecified] actions against me." As discussed below, I find that the other actions of Respondent which Complainant alleges violate the Act cannot be considered by me because the complaint which is before me at this time, filed by Complainant on March 30, 2003, does not make any allegation relating to these additional violations.

The decision of the Administrative Review Board (ARB) in Sasse v. Office of the United States Attorney, United States Department of Justice, ARB Case Nos. 02-077, 02-078, 03-044, ALJ Case No. 98-CAA-7 (January 30, 2004), is instructive here. The Sasse case involved the whistleblower's allegations in his complaint that his employer gave him a less than fully favorable performance evaluation and subjected him to a hostile working environment because of his protected activities under the Clean Air Act, 42 U.S.C. § 7622, and other federal environmental protection statutes. During the hearing before an administrative law judge (ALJ), the employer elicited testimony from the complainant regarding his having been suspended from work for violating rules of ethics. In addition, the employee testified that he believed that the suspension was "in some way connected" to his protected whistleblowing activities. Sasse, slip op. at 27. The employer moved to strike the employee's testimony because it pertained to events that occurred several years after the filing of the complaint and "their inclusion in this case … goes to issues of notice and due process." The ALJ denied the motion based on a theory of "a continuation of a pattern of violations" and because "these matters have been tried these past two weeks …." Sasse, slip op. at 30. Before the ARB, the employee argued that the ALJ properly amended the complaint. The ARB disagreed, stating that the employer had not been afforded due process of law because it was not fairly served notice that a new theory of violation or a new claim for relief was being raised. Id.

I construe the ARB's Sasse determination referred to above as requiring that a whistleblower complaint fairly and reasonably apprise the respondent of the nature of the latter's alleged violations of law – even where at the hearing the respondent has the opportunity to fully litigate the new allegation of violation. Even absent the Sasse ruling I would, and do, find that the complaint in the instant case that is limited to the allegation of constructive discharge is insufficient under due process of law requirements to provide adequate notice to Maxim of the additional allegations Complainant now makes. Simply put, the later allegations of violations are of a drastically different type than that which is contained in the complaint.

Based on the foregoing, I find that the allegations involving the promissory note, NASD arbitration claim, unspecified "correspondence," and unspecified other "egregious actions" by Maxim cannot be considered in this matter. [4]

[4] However, by my letter to OSHA today, I have forwarded to that agency copies of Complainant's letters dated June 14, July 7, and July 13 containing his additional allegations of violations of the Act by Maxim, and have suggested that OSHA should process these letters as

In light of the above, I find that the complaint filed on March 30, 2003 must be dismissed because it is untimely under the 90-day statute of limitations in 18 U.S.C. § 1514A(b)(2)(D).[5]

ORDER

It is ORDERED that the complaint herein is dismissed.

Respondent's request for the award of its attorney's fees against Complainant is denied.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

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constituting complaints filed under the Act on those dates, pursuant to the regulations at 29 C.F.R. §§ 1980.104 and .105.

[5] In Respondent's letters dated June 25 and July 15 (ALJ 6 and 10) it requests the award against Complainant of Maxim's "reasonable attorney's fees" related to this case. The regulations at 29 C.F.R. § 1980.109(b) permit the award of a reasonable attorney's fee – not exceeding $1,000 - to a respondent where the administrative law judge "determines that a complaint was frivolous or was brought in bad faith." I find that the fact that the complaint was untimely does not alone establish that the complaint was frivolous or brought in bad faith. I further find that the other information in the record before me is insufficient to establish that the complaint was frivolous or filed in bad faith. Moreover, I find that it is not appropriate to hold a formal oral hearing for the sole purpose of determining whether the award of an attorney's fee (not to exceed $1,000) is warranted in this case, as it would be impracticable and a waste of the Court's time because it would require extensive litigation of the merits of the untimely complaint. Consequently, Respondent's request for the award of an attorney's fee is denied.

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found in OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).