U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 September 2004

Case No.: 2004-SOX-00065

In the Matter of

SHEILA LAWRENCE
Complainant

v.

AT&T LABS and
AT&T CORPORATION
Respondent

Appearances: Sidney H. Lehmann, Esquire, For Complainant; Allison W. Jackson, Esquire, For Respondent

Before: ROBERT D. KAPLAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
DISMISSING THE COMPLAINT

This proceeding arises from a complaint filed on March 29, 2004 by Dr. Sheila Lawrence (Complainant) against AT&T Labs – AT&T Corp. (AT&T or Respondent), 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) at 18 U.S.C. § 1514A, by terminating her employment with Respondent. (ALJX 1)[1] The applicable regulations are contained in 29 C.F.R. Part 1980.[2]

In a letter dated June 24, 2004 the Occupational Safety and Health Administration (OSHA) denied the complaint because it was untimely. OSHA based this determination on its finding that, although Complainant last worked for Respondent on December 31, 2003 (or her "discharge occurred" on that date), the complaint was untimely under the Act's 90-day statute of

[1] "ALJX" refers to Administrative Law Judge's Exhibit.

[2] The Department of Labor's interim regulations (effective May 28, 2003) were replaced by final regulations effective on August 24, 2004. 69 Fed. Reg. No. 163, pp. 52104 et seq. (8/24/04).

limitations because Respondent informed her of its decision to terminate her employment in a letter dated August 8, 2003. (ALJX 2)[3]

Complainant filed a timely request for a formal hearing, and on July 21, 2004 the case was assigned to me. On the same date I issued an Order to Show Cause Why the Complaint Should not be Dismissed as Untimely, requiring Complainant to show cause why the complaint should not be dismissed because it was not timely filed under the 90-day statute of limitations in § 1514A(b)(2)(D) of the Act and the regulations at 29 C.F.R. § 1980.103.

Complainant responded to the Order to Show Cause in a letter dated August 11, 2004 which attached her prior argument contained in a letter dated July 15, 2004. Respondent responded in a letter dated August 20, 2004.

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

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background

As I am resolving this case without an oral hearing, and in the manner of ruling on a motion for summary decision against Complainant, I shall accept all of Complainant's factual allegations at this time as being true.

Respondent's letter to Complainant dated August 8, 2003 consists of three pages and has three attachments. The letter states, in pertinent part:

> Your organization has identified a force imbalance within your business unit.
>
> Unfortunately, as a consequence of the force imbalance at, 30 Knightsbridge Rd., Piscataway, NJ 08854, you have been identified as "At-Risk" of involuntary termination. The attached Banding Criteria Form and Age distribution Form provides additional information concerning the function and salary bands affected within your organization.
>
> Neither you nor any other employee is eligible to volunteer to terminate under the FMP. On October 6, 2003, your Scheduled Off-Payroll Date, you will be involuntarily terminated unless you are placed in another position with AT&T prior to that date.

(ALJX 2, p. 1) Subsequently, the letter discusses Complainant's eligibility for several benefits, including those under "the AT&T Separation Plan" and requests that she

[3] Respondent submitted ALJX 2 to OSHA which forwarded it to the undersigned.

> sign, return (and not revoke) the applicable valid Termination Agreement and Release so that it is received (not postmarked) by your scheduled Off-Payroll Date or actual termination date, if later.

(ALJX 2, p. 1) The remainder of the letter relates that Respondent makes available to Complainant assistance in obtaining employment "outside of AT&T" and explains the procedure for obtaining benefits. The first attachment bears Complainant's name and contains dollar calculations that appear to be based on her annual salary and period of employment, with a "Total Gross Payment" of $77,206.25, and states that the "calculations of your severance payments" are "estimated." The second attachment is entitled "Banding Criteria" and refers to "skills assessment." The third attachment is entitled "Age Distribution Report (Involuntary Only Option)" and contains columns for various "Bands."

The complaint filed by Complainant on March 29, 2004 states that Complainant "received her last paycheck in January 2004 for the period through December 31, 2003." (ALJX 1, p. 1) This statement is reiterated in Complainant's letter (page 1) to the Office of Administrative Law Judges dated July 15, 2004 by which she requested a hearing. This letter (page 2) also notes that Respondent's August 8, 2003 letter to Complainant states that she would be terminated unless she was placed in another position with Respondent prior to October 6, 2003.[4]

In a letter dated August 11, 2003 from Complainant's counsel to Dr. Tariq Hasan, Complainant's supervisor, counsel stated:

> On Friday [August 8, 2003] Dr. Lawrence contacted me following her telephone conversation with you in which you advised her that not only was her position . . . being eliminated, but her employment with AT&T would be completely terminated, effective December 31, 2003, unless she could find some alternative position with the Company. Obviously, this was quite upsetting to Dr. Lawrence, particularly given her almost twenty-five (25) years of excellent service to AT&T.

(ALJX 3) The letter requested that Respondent provide Complainant's counsel with the AT&T retirement plan and her benefits "once she achieved twenty-five years of service" in April 2004. The concluding paragraph of the letter requested Hasan to advise counsel of Complainant's "status . . . as of this date, and whether she is to continue to perform her duties, and where she is to report." The last sentence of the letter states:

> While [Complainant] remains ready and willing to perform all of her functions as District Manager with AT&T Labs, the shock of this notice of termination may require that she take some short period of sick leave in order to regroup.

[4] The remainder of the July 15, 2004 letter consists of argument which will be considered below.

Finally, in a letter to Respondent dated December 19, 2003 (ALJX 4), Complainant's counsel stated that Complainant "had initially been advised that her position was being eliminated effective October 6, 2003, and the paperwork provided to her was based on that date." The letter went on to state that Complainant's employment had been extended to "at least" December 31, 2003, and question what was her "employment status at this time." (ALJX 4, p. 1) Continuing, the letter stated that Respondent acted "to single Dr. Lawrence out for termination in retaliation" for her protected activity. In the penultimate paragraph of this letter, Complainant's counsel stated: "[S]he was terminated in order to permit AT&T Labs upper management to usurp her work . . . and claim it for their own." (ALJX 4, p. 2)

The Complaint was Untimely

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:

> [T]he alleged violation…is considered to be when the discriminatory decision has been both made and communicated to the complainant. (Citing Delaware State College v. Ricks, 449 U.S. 250, 258 (1980).) 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).[5]

[5] Section 1980.103 of the final regulations and the Department's commentary thereon are identical to that section of the interim regulations and the commentary thereon.

Complainant does not dispute that she received Respondent's letter dated August 8, 2003. As noted above, the letter informed Complainant that:

> On October 6, 2003, your Scheduled Off-Payroll date, you will be involuntarily terminated unless you are placed in another position within AT&T prior to that date.

Subsequently, as Complainant states in her letter dated July 15, Respondent extended her employment through December 30, 2003. In Respondent's letter to me dated August 20, 2004 it states that on August 8, 2003 – the date of the letter in which Complainant was advised that she would be involuntarily terminated on October 6, 2003 – Complainant's manager, Dr. Tariq Hasan, notified her that her employment was "extended through December 30, 2003" because she was involved in projects and "needed to transition her work . . ." Respondent's August 20, 2004 letter further states that Dr. Hasan also informed Complainant that "this extension would in no way impact her 'at-risk' status," but "she could avoid involuntary termination scheduled to take place on December 30, 2003" if she secured other employment within Respondent "on her own."

Complainant does not dispute any of these statements in Respondent's letter dated August 20, 2004, although she has had ample opportunity to do so. More significant, the statements in Complainant's counsel's own letters to Respondent dated August 11, 2003 and December 19, 2003 (ALJX 3 and 4) are entirely consistent with Respondent's contentions. Indeed, Complainant's August 11, 2003 letter acknowledges that on August 8, 2003 Dr. Hasan informed Complainant that

> her employment with AT&T would be terminated completely terminated (sic), effective December 31, 2003, unless she could find some alternative employment within the Company.

(ALJX 3, p. 1) The letter concluded by stating that Complainant was in "shock" due to the "notice of termination." Thus, it is quite clear that, as of August 8, 2003, Complainant was fully aware that her employment with Respondent would be terminated on December 30 or 31, 2003.

In addition, Complainant has not alleged that anything changed after August 8, 2003. That is, she continued to work for Respondent and was unable to find an alternate job with the company to avoid the scheduled termination of her employment at the end of December 2003. This is confirmed by her counsel's December 19, 2003 letter to Respondent in which he acknowledged that Complainant would be terminated. The fact that Complainant's counsel's letter also posed a question about her "employment status at this time" is not evidence she had any real doubt that her employment would cease in the next 11 or 12 days.

I find that the uncontradicted evidence establishes that as of August 8, 2003 Complainant had ample reason to believe that her employment with Respondent would be terminated on December 30 or 31, 2003. I further find there is nothing to indicate that anything happened after August 8, 2003 that would have been a reasonable basis for Complainant to believe Respondent had withdrawn or altered its determination to discharge her at the end of 2003. Moreover, on

December 19, 2003 – more than 90 days before Complainant filed her complaint on March 29, 2004 – her attorney wrote a letter in which he reiterated his awareness of Respondent's decision to discharge Complainant at the end of the year. The fact that Complainant could have avoided termination if she found another job with Respondent does not prevent the statute of limitations from running. The statute of limitations begins to run when the employee is made aware of the employer's decision to terminate him or her even when there is a possibility that the termination could be avoided. English v. Whitfield, 858 F.2d 957 (4th Cir. 1988); Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) (cited by Ricks, 449 U.S. at 261).

Complainant's arguments against dismissal of the claim for untimeliness are that the cited precedents are inapposite, that it is inappropriate to have a "rigid application of [the statute of limitations because this] would require that employees must file a complaint as soon as they become aware of possible discrimination, rather than the date of actual termination," and New Jersey courts have rejected such an application. (July 15, 2004 letter to the Office of Administrative Law Judges, p. 4) I disagree with these contentions, as the federal precedents are quite clear on the subject and the state court determinations are not determinative here. In addition, in his letter to me dated August 11, 2004, Complainant's attorney argues that the Act should be interpreted to mean that "the fundamental violation which triggers the running of the statute of limitations is the discharge" that occurred "the end of December, 2003." (August 11, 2004 letter, p. 2) I disagree, as the Act, the regulations, and the applicable precedents are to the contrary. Under these, as noted, the acts or events that trigger the running of the statute of limitations are a decision of the employer to discharge the employee, or otherwise adversely affect the employee's employment, and communication of that decision to the employee. Finally, in the August 11, 2004 letter Complainant implies that from August 8, 2003 until December 31, 2003 Complainant and Respondent were involved in an "on-going interactive process" in order to find an alternative to the termination of her employment. However, no facts in support of such a contention have been stated by Complainant. Again, it is clear that from August 8, 2003 Complainant knew that her termination at the end of 2003 could be avoided only if she was able to obtain another job with Respondent through her own efforts.

II. CONCLUSION

Based on the foregoing, I find that the complaint filed on March 29, 2004 is barred by the 90-day statute of limitations in 18 U.S.C. § 1514A(b)(2)(D). The statute of limitations began to run more than seven months before the complaint was filed when, on August 8, 2003, Complainant was advised that her job with Respondent would be terminated on December 30 or 31, 2003. At the latest, the statute of limitations began to run on December 19, 2003, as evidenced by Complainant's counsel's letter of that date in which he acknowledged that Respondent had decided to discharge her at the end of December 2003. This acknowledgment came 100 days before the complaint was filed.

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: 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"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington, DC 20210, and within 30 days of the filing of the petition, the Board 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 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).