U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 May 2007

CASE No. 2007-SOX-20

In the Matter of:

HARIDAS JANARDHAN SALIAN,
Complainant,

v.

REEDHYCALOG UK, an indirect, wholly-owned
Subsidiary of GRANT PRIDECO, INC.,
Respondent.

ORDER DISMISSING COMPLAINT ON SUMMARY DECISION

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A et seq. ("the Sarbanes-Oxley Act" or "the Act") enacted on July 30, 2002. The Sarbanes-Oxley Act provides the right to bring a "civil action to protect against retaliation in fraud cases" under section 806 to employees who "provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employer reasonably believes constitutes a violation of [certain provisions of the Sarbanes-Oxley Act], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders…" 18 U.S.C. §1514A(a)(1). The Sarbanes-Oxley Act extends such protection to employees of companies "with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §781)["SEA of 1934"] or that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §780(d))." 18 U.S.C. §1514A(a).

By letter filed September 27, 2006 with the Department of Labor, Occupational Safety and Health Administration ("OSHA"), Haridas Janardhan Salian ("Complainant"), filed a charge of retaliation against his employer, ReedHycalog UK, an indirect, wholly-owned subsidiary of Grant Prideco, Inc. ("Respondent"), under the Whistleblower protection provisions of the Sarbanes-Oxley Act. Complainant alleged that he was discharged from employment with Respondent in retaliation for raising protected complaints. By letter dated December 18, 2006, the Regional Supervisor of OSHA denied the complaint, finding that it lacked merit because Complainant was a foreign national employee. Complainant then appealed to the Office of Administrative Law Judges. A formal hearing is scheduled for May 22, 2007. On April 2, 2007, Respondent filed a Motion for Summary Judgment. Then, after an Order to Show Cause, Complainant responded on April 29, 2007. Respondent filed a Reply on May 9, 2007.

Respondent contends that Complainant's complaint was not timely filed and that Complainant is not a covered employee under the Act.

Summary Judgment Standard

The Rules of Practice and Procedure for administrative hearings are set forth at 29 C.F.R. Part 18. Summary Judgment can be granted "if the pleadings, affidavits, material obtained by discovery … or matters officially noticed show that there is no genuine issue as to any material fact." 29 C.F.R. § 18.40(d). Respondent as the moving party has the burden to prove Claimant's case lacks evidence to support his claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden then shifts to the non-moving party (the Complainant) to bring forth evidence illustrating a genuine issue of material fact does exist. *Id*. The Court must look at the record as a whole and determine whether the fact finder could rule in Complainant's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The evidence must be construed in favor of the non-moving party (the Complainant). *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001). However, "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 No. 04-123, ALJ No. 2004-SOX-35, slip op. at 5 (ARB September 30, 2005), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Findings of fact and conclusions of law

Title 18 U.S.C.A. § 1514A of the Sarbanes-Oxley Act ("Act") is designed to hold publicly traded companies responsible for fraudulent activity. Section 1514A is a whistleblower provision that provides protection for employees of these publicly traded companies who provide information or assist in the investigation of conduct which the employee reasonably believes constitutes a fraudulent activity that violates federal law. 18 U.S.C. § 1514A(a)(1). The Act protects those employees of companies "with a class of securities registered under Section 12 of the Securities Exchange Act of 1934." *Id*. Complaints under this provision are filed with the Secretary of Labor, who is to investigate and adjudicate the matter. Title 49 U.S.C.A. § 42121(b) of the Wendell H. Ford Aviation Investment and Reform Act sets forth the standards of proof in a Section 1514A claim. 18 U.S.C.A. § 1514A(b)(2)(C). "Accordingly, to prevail, a complainant must prove that: (1) the complainant engaged in a protected activity; (2) the respondent knew that the complainant engaged in protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." *Reddy*, ARB No. 04-123, p.7. If a complainant proves all four elements, the burden shifts to the employer to prove by clear and convincing evidence that it would have taken the same action had the protected activity not occurred. *Bechtel v. Competitive Tech., Inc.,* ALJ No. 2005-SOX-00033, p. 26 (October 5, 2005). However, first Complainant must prove that he is a covered employee and Respondent is a covered employer under the Act.

The Sarbanes-Oxley Act established a statute of limitations for filing a complaint relating to employment discrimination taken against individuals who participate in activity protected under the Act. 18 U.S.C §1514A(b)(2)(D). Non-compliance with the time limitation bars the adjudication of a complaint under the Act. Specifically, the Act provides:

> **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 regulations at 29 C.F.R. §1920.103 state:
>
> **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 discrimination …

The Department of Labor's commentary on the regulations 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).

Title 18 U.S.C. § 1514A(b)(2)(D) provides that an action must be commenced within ninety days of the alleged adverse action. In *Rollins v. American Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-9 (ARB Apr. 3, 2007), the Board held that once a complainant is provided with a final and unequivocal notice as to the employer's intent to terminate him/her, the limitations period begins to run. This is true even if the official date of termination is on a later date. *See* 29 C.F.R. § 1980.103(d); *Flood v. Cedant Corp.*, 2004-SOX-16 (ALJ Feb. 23, 2004), *Watson v. Eastman Kodak Co*., 235 F.3d 851 (3d Cir. 2000); *Carter v. Champion Bus, Inc.*, 2005-SOX-23 (ALJ Mar. 17, 2004); *Lawrence v. AT&T Labs*, 2004-SOX-65 (ALJ Sept. 9, 2004). Therefore, Complainant should have filed his complaint ninety days after receiving notice of his impending termination.

Respondent asserts that on May 23, 2006, Complainant's supervisor, Mike Critchley, informed Complainant that he was being terminated and that his termination would become effective on June 30, 2006. (Affidavit of Mike Critchley, attached to Respondent's Motion for Summary Judgment). Therefore, since Complainant did not file his complaint until September 27, 2006, Respondent argues that it is untimely. Complainant urges that the limitations period did not start to run until June 30, 2006. As the non-moving party, Complainant has the burden to bring forth evidence illustrating a genuine issue of material fact does exist as to the issue of timeliness. Complainant has not met this burden. Beyond arguing that June 30, 2006 was his last date of employment and that he was actually informed on this day, he has presented no evidence to support these facts. Complainant also argues that the notice was not given to him in writing; however, under the Act there is no requirement that notice of termination has to be in

writing. Since Respondent provided Complainant with an unequivocal verbal notice of termination, I find that Complainant had adequate notice to trigger the running of the statute of limitations. Therefore, based upon the evidence in the current record, I find that Complainant was informed on May 23, 2006 that he was to be terminated. Accordingly, the complaint was untimely filed.

Furthermore, since the complaint was untimely filed there is no need to address the issue of whether Complainant is a covered employee under the act.[1]

Respondent's Motion for Summary Decision is hereby GRANTED. Complainant's complaint is DISMISSED with prejudice. Accordingly, the hearing scheduled for May 22, 2007 is canceled and all pending motions are hereby moot.

A

JOSEPH E. KANE
Administrative Law Judge

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, N.W., Washington, D.C. 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or email 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, N.W., Suite 400-North, Washington, D.C. 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, D.C. 20210.

If no petition is filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109©. Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the

[1] Even if I had addressed this issue, I would have found that Complainant failed to bring forth evidence that an issue of material fact exists as to whether he is a covered employee. Although he listed possible evidence to support his assertions, he provided no evidence to the Court. The current record supports a finding that Complainant is a foreign national, employed by a foreign non-publicly traded subsidiary of an American corporation and that he performed all of his work outside of the United States.

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).