

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 January 2005

CASE NO.: 2005 SOX 5

In the Matter of
EMANUEL STAVRULAKIS
Complainant

v.

FOREST CITY ENTERPRISES, INC.
Respondent

Appearances: Ms. Cathleen M. Bolek, Attorney
For the Complainant

Ms. Sue Marie Douglas, Attorney
Mr. Robert P. Duvin, Attorney
Mr. James P. Smith, Attorney
For the Respondents

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**ORDER --
APPROVING COMPLAINANT'S VOLUNTARY DISMISSAL OF
OBJECTION AND HEARING REQUEST**

This matter arises under the employee protection provision of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, (Public Law 107-204), 18 U.S.C. § 1514A ("Act" or "SOX") as implemented by 29 C.F.R. Part 1980. This statutory provision prohibits an employer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 from discharging, or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to alleged violations of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission ("SEC"), or any provision of federal law relating to fraud against shareholders.

Pursuant to a Revised Notice of Hearing, dated November 23, 2004, I set a hearing date of February 22, 2005 for this case in Cleveland, Ohio. On January 17, 2005, I received from Complainant's counsel, Ms. Bolek, a Motion for Voluntary Dismissal, Without Prejudice.

According to Ms. Bolek, the Complainant believes state court is the more appropriate forum for the parties' dispute, which essentially involves an alleged breach of a written contract. As a result, the Complainant seeks the voluntary dismissal of his action "without prejudice to his right to pursue claims under state law." Under these circumstances, Ms. Bolek asserts the Complainant should "be permitted to withdraw or dismiss" his complaint or appeal under the Act.

On January 19, 2004, I received a response from Respondent's counsel, Mr. Smith. Based on the phrase, "without prejudice," Mr. Smith believes the Complainant's motion contains a request that I refrain from affirming the Assistant Secretary's initial findings and order. Such relief is not authorized under the regulations. According to Mr. Smith, although 20 C.F.R. § 1980.111 (c) permits a party to withdraw his objection prior to findings and an order by an administrative law judge, such an action constitutes a withdrawal of the complainant's objection to the Assistant Secretary's initial findings and order. Consequently, upon the Complainant's voluntary withdrawal of his objection, the findings and preliminary order of the Assistant Secretary in this case must be affirmed and reinstated.

Discussion

On April 12, 2004, through counsel, Mr. Stavoulakis filed a SOX complaint with the Assistant Secretary, U.S. Department of Labor. Mr. Stavoulakis alleged that the Respondent, Forest City Enterprises, had violated the SOX employee protection provisions. Specifically, in retaliation for his SOX protected activities, the Respondent provided negative job references which breached the provisions of a separation agreement between the parties.

On October 1, 2004, the Assistant Secretary issued findings and a preliminary order dismissing Mr. Stavoulakis' SOX whistleblower complaint. According to the Assistant Secretary, investigation failed to substantiate that Forest City had provided a negative or untrue job reference. Since insufficient evidence existed to demonstrate that Mr. Stavoulakis had suffered an adverse action, the Assistant Secretary determined that dismissal of his SOX complaint was warranted. The Assistant Secretary advised the parties that in the absence of a timely appeal for an administrative law judge hearing, the findings and preliminary order would become the Final Order of the Secretary of Labor.

On October 29, 2004, through counsel, Mr. Stavoulakis presented to the Office of Administrative Law Judges: a) a timely objection to the Assistant Secretary's findings and preliminary order; and, b) a request for a hearing before an administrative law judge.

Under the provisions of 20 C.F.R. § 1980.111 (c), any party may withdraw its objections to the findings and preliminary order of the Assistant Secretary¹ at anytime prior to the time the findings and an order of an administrative law judge become final. Clearly, Mr. Stavoulakis' Motion for Voluntary Dismissal has been filed in a timely manner. Further, approval of his request would terminate all proceedings before the Office of Administrative Law Judges.

¹See 20 C.F.R. § 1980.105.

The only issue related to Mr. Stavoulakis' request involves the phrase, "without prejudice." I have considered Respondent's stated concern that the purpose of the phrase is to indefinitely suspend implementation of the Assistant Secretary's findings and preliminary order. However, within the context of his motion, I find the Complainant has included the phrase only to ensure that the dismissal of his objection will not adversely affect his ability to pursue subsequent relief under state law. In that regard, my authority in this case relates solely to the federal whistleblower cause of action under SOX. I do not interpret the phrase to mean that the Complaint seeks an indefinite deferral of the Assistant Secretary's findings and preliminary order.

Approval of Mr. Stavoulakis' dismissal request effectively removes his objection and request for an administrative law judges hearing. As the Assistant Secretary previously advised the parties, in the absence of an objection and request for a hearing before an administrative law judge, the Assistant Secretary findings and preliminary order becomes the Final Order of the Secretary of Labor. Accordingly, with these considerations in mind, I find approval of Mr. Stavoulakis' Motion for Voluntary Dismissal, which effectively withdraws his objection to the Assistant Secretary's October 1, 2004 initial findings and preliminary order and his hearing request, is appropriate.

ORDER

The objection of Mr. EMANUEL STAVRULAKIS to the October 1, 2004 findings and preliminary order of the Assistant Secretary and the corresponding request for an administrative law judge hearing are **DISMISSED**. The hearing scheduled for February 22, 2005 is cancelled.

SO ORDERED:

A
RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: January 26, 2005
Washington, D.C.