U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 March 2006

CASE NO.: 2006-SOX-00045

In the Matter of:

SCOTT RUSICK,
Complainant,

v.

MERRILL LYNCH & CO., INC.,
Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DISMISSING THE COMPLAINT

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 SOX") 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 employee 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).

A. Procedural History

On August 22, 2005, Scott Rusick ("Complainant") filed a complaint against Merrill Lynch & Co., Inc. ("Respondent"), asserting claims of unlawful retaliation under the employee protection provisions of Sarbanes-Oxley Act. In brief, Complainant alleged that he was constructively discharged from Respondent's employ because he raised complaints and concerns regarding numerous and significant computer software compliance problems that impacted on Respondent's shareholders. Subsequent to the filing of the complaint, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") conducted an investigation into the matter. By Findings and Order dated December 7, 2005, the Secretary of Labor, acting through her agent, the Regional Administrator for OSHA, Region II ("Secretary"), dismissed the complaint. The Secretary found no constructive discharge, because it found that Complainant

had abandoned his job. Consequently, the Secretary found no adverse employment action under the SOX. As such, the Administrator found that Complainant failed to allege a prima facie complaint.

On January 10, 2006, Complainant filed objection to the Secretary's findings with the United States Department of Labor's Office of Administrative Law Judges ("OALJ"). The case was thereafter assigned to me and, by Notice of Hearing and Pre-Hearing Order dated January 19, 2006, I scheduled a formal hearing on the matter on February 14, 2006, in New York, New York. On January 23, 2006, Respondent moved for a continuance of the hearing. Accompanying that motion for continuance was Respondent's Motion for Summary Decision Dismissing Complaint[1] which included Respondent's exhibits identified as A through S.[2] On January 27, 2006, Complainant filed an objection to Respondent's motion for a continuance. Both parties filed a Statement of Jurisdiction, pursuant to my Pre-Hearing Order.

I held an informal telephone conference with the parties on February 2, 2006, during which I addressed the outstanding motions by Respondent and the parties' positions. Complainant's counsel stated that Complainant intended to remove his case to Federal district court upon the expiration of the administrative period within which the Act provides the Secretary to dispose of cases. I extended the time within which Complainant should file his response to Respondent's motion for Summary Judgment, and set February 8, 2006 as the deadline for Complainant's response. I stated that in the event of removal to Federal court, I would not expect a timely filed response to the motion for summary judgment.[3] I instructed Complainant to file notice of his intention to remove the case. I granted Respondent's motion for continuance and rescheduled the formal hearing to commence on Monday, April 3, 2006. I summarized the discussion in an Order issued February 3, 2006

On February 6, 2006, Complainant filed notice of his intent to remove the complaint to Federal district court. On February 7, 2006, I issued an Order directing Complainant to serve OALJ with a copy of pleadings filed in Federal district court, and advising that I would retain jurisdiction until so served. Because Complainant did not serve OALJ with a copy of pleadings in Federal district court, by Notice and Order issued March 13, 2006, the parties were advised that the hearing date of April 3, 2006 remained in effect and that OALJ continued to assert jurisdiction over the matter. On March 21, 2006, Respondent moved for dismissal of the complaint for Complainant's failure to oppose Respondent's Motion for Summary Decision, dated January 24, 2006. On March 21, 2006, Complainant responded with a letter reiterating his intention to remove the case to federal district court.

B. Issues

The sole issue I shall address is whether Respondent's Motion for Summary Decision and Dismissing Complaint should be granted for Complainant's failure to respond.

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[1] Denoted as "RM at -."
[2] Denoted as "RX-A" through "RX-S."
[3] Complainant filed his complaint with the Secretary on August 22, 2005, and the 180 day period referred to in § 1514A(b)(1)(B) of the Act expired on February 16, 2006.

C. Findings of Fact and Conclusions of Law

An Administrative Law Judge with OALJ may enter summary judgment for a party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue of material fact. 29 C.F.R. §§ 18.40, 18.41; Federal Rule of Civil Procedure 56(c). The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case". Celotex Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 262 (1986).

Respondent has argued that entry of summary decision and dismissal of the complaint is appropriate, as Complainant has failed to respond to its motion. Complainant has filed no substantive response, nor addressed the grounds for judgment set forth by Respondent in its motion. Complainant addressed Respondent's motion for entry of judgment upon Complainant's failure to respond as follows:

> [Respondent's counsel's] suggestion that, by not following some unspecified time frame dictated by Merrill Lynch, Mr. Rusick has somehow defaulted on Merrill's motion for summary decision, is unfounded if not misleading. There is no basis for such an assertion, [counsel] cites no authority in support, [Complainant] has made clear that a federal action will be filed shortly, and we submit that such a filing is fully consistent with prior proceedings in this matter.

¶2 of Correspondence dated March 21, 2006, addressed to me and signed by Complainant's counsel.

The factual underpinnings of Complainant's foregoing argument are faulty. In the first instance, the time frame at issue was dictated by me in my Order of February 3, 2006, when I extended the time within which Complainant should respond to Respondent's motion for summary judgment to February 8, 2006. However, I did not expect Complainant to meet that deadline because he advised that he intended to remove his complaint to Federal district court. Pursuant to § 1514A(b)(1)(B), an individual may seek relief under the Act by :

> if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United Stated, which shall have jurisdiction over such an action without regard to the amount in controversy.

18 U.S.C. § 1514A(b)(1)(B).

As Complainant filed his complaint with the Secretary on August 22, 2005, the 180 period was set to expire on February 16, 2006, a mere 7 days after the date set for responding to the motion for Summary Judgment. Therefore, I advised the parties that I would not anticipate Complainant's response, as I expected Complainant to remove his complaint as soon as practicable upon the expiration of the administrative time frame set forth by the Act. However, I

fully expected compliance with my Order if Complainant did not remove the case. When almost one month passed after the expiration of the 180 day period without receiving Complainant's pleadings, I issued a Notice and Order advising the parties that OALJ's jurisdiction in this matter remained intact. The expiration of the 180 day period does not trigger the expiration of the Secretary's jurisdiction over complaints brought under the Act, but merely provides Complainant the option to remove the complaint to Federal district court. Absent such removal, the Secretary's jurisdiction remains. Accordingly, Respondent's motion remains outstanding.

Complainant has erroneously charged that Respondent's assertion that his failure to respond to its motion for summary decision is unfounded and without basis. Complainant's only response to an outstanding dispositive motion is the letter of March 21, 2006, which sets forth no substantive response to Respondent's motion. In that communication, Complainant disparaged Respondent's pleadings and repeated his intention to remove the case to Federal court. Despite my notice of OALJ's continuing jurisdiction, Complainant has not removed his complaint and has not responded to Respondent's outstanding motion. Contrary to Complainant's contention, I find that Respondent has cited adequate authority in support of its position that summary decision in its favor is warranted.

Section 18.40(d) of The Rules of Practice and Procedure Before OALJ allows an Administrative Law Judge ("ALJ") to "enter summary judgment for either party [if] there is no genuine issue as to any material fact…". 29 C.F.R. § 18.40(d). The Administrative Review Board ("the Board") has acknowledged the propriety of entering summary judgment on behalf of a moving party in the absence of response. Relying upon Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), in the matters of Mark J. Watson, v. Electronic Systems Corporation, et al, ARB Case Nos. 04-023, 029, 050, 099, May 31, 2005, the Board stated: "[o]nce 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. [citation omitted] The non-moving party may not rest upon mere allegations, speculation, or denials of his pleading, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof." Id. at 2. The Board also relied upon Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986), and cited that authority and an earlier decision rendered by the Board in the matter of Seetharaman v. General Electric Co., ARB No. 03-029, ALJ No. 02-CAA-21, slip op. at 3 (ARB May 28, 2004), stating: "[i]f the non-moving party fails to demonstrate an element essential to his case, there can be no genuine issue as to any material fact", because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Seetharaman, supra., at 3, citing Celetox, supra., at 322-23.

This concept is incorporated into § 18.40(c), which directs that "a party opposing the motion [for summary decision] may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing". 29 C.F.R. § 18.40(c). Accordingly, the Rules of Practice and Procedure before OALJ infer that summary decision in favor of the moving party may be granted where a party fails to respond.

In the instant matter, I find it appropriate to enter summary judgment in favor of Respondent. Considerable latitude has been allowed to Complainant to remove his complaint to federal court. Despite Complainant's repeatedly stated intention, he has had more than one month to do so. Parenthetically I note that Complainant initially objected to Respondent's motion for continuance. Had I denied the motion, the hearing in this case would have commenced before the expiration of the 180 days, thereby providing an argument against removal of the matter to Federal district court. As OALJ's jurisdiction continues to apply, it is proper for me to consider Respondent's motion for summary judgment. Respondent reopened its motion by moving for default, thereby giving Complainant another opportunity to address the substantive allegations raised therein. Instead of addressing Respondent's motion, Complainant filed a cursory response, again maintaining that he intended to remove his complaint to federal court. I decline to rely any further upon Complainant's unsubstantiated representations. Accordingly, considering the length of time that Complainant has had to respond to Respondent's motion or to remove his complaint, and his subsequent non-responsive response to Respondent's renewed motion for summary decision, I find that Respondent's motion for summary decision is unopposed, and I hereby GRANT the motion.[4]

ORDER

It is ORDERED that Respondent's motion for Summary Decision is GRANTED. The complaint of SCOTT RUSICK is hereby DISMISSED.

A

Janice K. Bullard
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).

[4] I note that my grant of Summary decision dismissing Complainant's complaint does not affect Complainant's ability to remove his complaint to Federal district court, as this Decision and Order does not become the final decision of the Secretary until the period for filing an appeal with the Board has expired, as set forth in the Notice appendixed to this Decision and Order. Since the 180 day period allowed to the Secretary under the Act to issue a final decision has already elapsed, Complainant remains free to remove his complaint to federal Court until this Decision becomes final.

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).