UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PATRICIA A. ALLEN, ET AL.	**CIVIL ACTION**
VERSUS	**NO. 05-4033**
STEWART ENTERPRISES, INC.	**SECTION "K"(3)**

ORDER AND REASONS

Before the Court is Defendant's Motion for Summary Judgment or, Alternatively, for Mandamus Relief (Doc. 7) filed by Stewart Enterprises, Inc. ("STEI") in which it seeks the dismissal of the claims of plaintiffs Patricia A. Allen ("Allen"), Laura L. Waldon ("Waldon") and Dana Breaux ("Breaux") (collectively referred to as "plaintiffs") based on collateral estoppel, or, alternatively, the issuance of an order by the Court to the Administrative Review Board("ARB") to complete its administrative review of this matter within specified time limits deemed acceptable to the Court. Having reviewed the pleadings, memoranda, and the relevant law, the Court finds the motion to have merit.

SOX Procedural Guidelines

Plaintiffs bring this suit pursuant to the Sarbanes-Oxley Act, 18 U.S.C. § 1514A ("SOX") for their allegedly wrongful terminations relating to their acts as whistleblowers. A brief review of its procedural provisions is required to understand the context of this suit. Under this law, claimants have 90 days after an adverse employment action to file a complaint with the Secretary of Labor. 29 C.F.R. § 1980.104(a). *See* Irvin B. Nathan & Yue-Han Chow, *Interpretations and Implementation of the Whistleblower Provisions of the Sarbanes-Oxley Law*, SL027 ALI-ABA 527, 539 (2005) (hereafter "*Whistleblower").* If a prima face case is made and the respondent cannot

show, within 20 days, by clear and convincing evidence that it would have taken the same adverse employment action in the absence of protected activity, then the Secretary of Labor will launch an investigation. 29 C.F.R. § 1980. 104(b)(2) and (d); *Whislteblower* at 539.

After an investigation, the investigator notifies the respondent if he finds that the circumstances warrant a preliminary order of reinstatement. The respondent then has 10 days to submit a written response, meet with the investigator to present witness statements, and present legal and factual arguments. 29 C.F.R. § 1980.104(d); *Whistleblower* at 540. The Secretary then issues written findings that will either dismiss the complaint or order relief for the complainant. 29 C.F.R. § 1980.105(a)(1).

The claimant then has 30 days to request a hearing before an ALJ and submit objections within 30 days of receipt of the findings or the Preliminary Order. Otherwise, the findings and Preliminary Order are final. 29 C.F.R. § 1980.106(b)(2). Any party has 10 days to request review by the ARB. 29 C.F.R. § 1980.110(b). *Whistleblower* at 541. Unless the ARB issues an order accepting the case for review, then the ALJ's decision becomes the final decision of the Secretary. The ARB has 30 days to decide whether it may accept an appeal. 29 C.F.R. § 1980.110(b). The ARB has 120 days to issue a decision after the conclusion of the ALJ hearing which is 10 days after the date of the ALJ's decision. 29 CFR. §1980(c). An adversely affected party may file a petition for review of the final order in the appropriate federal circuit court. 29 C.F.R. § 1980.112(a).

However, if the Secretary of Labor does not issue a final decision within 180 days of the filing of the Complaint and there is no showing of a bad faith delay by complainant, a claimant can sue in federal district court, though he or she must provide notice of intent to file in district court 15

days before doing so. § 29 C.F.R. § 1980.114; *Whistleblower* at 541. In that context, the specifics concerning this matter must be reviewed.

Background

Plaintiffs allege that on January 29, 2004, they filed a discrimination complaint with the Occupational Safety and Health Administration ("OSHA") under SOX within 90 days after the alleged violations of SOX occurred. (Complaint, ¶8). On May 5, 2004, OSHA dismissed their complaint. On June 22, 2004, plaintiffs filed a request for a hearing with the office of the Administrative Law Judges, U.S. Department of Labor.[1] A formal hearing was held from August 30, 2004 through September 7, 2004. On February 15, 2005, the Administrative Law Judge rendered a final decision and order. (Complaint ¶10).

On February 24, 2005, the ARB granted plaintiffs an extension of time in which to file a petition for review. On March 22, 2005, Plaintiffs filed for review. On March 24, 2005, the ARB issued an order establishing a briefing schedule.[2] Plaintiffs contend that they filed their brief in a timely manner; however, STEI filed a motion to strike the memorandum contending that it did not comply with the ARB's scheduling order because it was greater than the pages allowed under the order by virtue of it allegedly incorporating their Petition for Review.(Complaint, ¶10).

On May 5, 2005, the ARB suspended its scheduling order and ordered plaintiffs to show cause by May 16, 2005 why the Board should not dismiss their appeal. Plaintiffs responded by offering to reduce their brief to 30 pages by striking the conclusion and averred that there was no

[1]That 180 day period ran on or about July 27, 2004.

[2]The Court assumes then that a review was granted as a briefing schedule issued.

incorporation of the petition in the brief. The ARB had not ruled on the show cause order at the time this matter was filed. (Complaint ¶12).

The ARB did not render a decision on plaintiffs' petition for review within 120 days of the timely filing for review as required under 29 C.F.R. § 1980(c). Thus, plaintiffs maintain that they have filed this action more than 180 days after filing their complaints with the Department of Labor. As such, under 29 C.F.R. § 1980.114, they are entitled to seek *de novo* review in this Court which has jurisdiction .

Analysis of Motion

STEI recognizes that SOX provides that plaintiffs may bring this action in federal court under 18 U.S.C. § 1514A(b)(1)(B). However, it maintains that once a case is filed in federal court, the court has the right to dispose of the case under collateral estoppel or other grounds, and nothing in SOX or the regulations interpreting SOX prevents the court from doing so. (Defendant's Reply, Doc. No. 13). Thus, the issue presented is whether SOX precludes this Court from exercising its long recognized power to prevent needless duplicative litigation which includes the "inherent power to stay any matter pending before it in the interest of justice and 'economy of time and effort for itself, for counsel and for litigants.'" *Dresser v. Ohio Hempery, Inc.*, 20004 WL 464895 (E.D.La. March 8, 2004) citing *Laitram Machinery, Inc. v. Carnitech A/S*, 903 F. Supp. 384, 387 (E.D. La. 1995) *quoting Landis v. North American Co.*, 229 U.S. 248 254 (1936). "A court may stay an action, pending resolution of independent proceedings which bear upon the case, regardless of whether the parallel proceedings are 'judicial, administrative or arbitral in character.'" *Dresser* at *2.

As noted by the Fifth Circuit in *Castillo v. Railroad Retirement Bd. of the United States*, 725 F.2d 1012 (5th Cir. 1984) citing *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966):

> "[W]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."As we explained in *Painters District Council No. 38 v. Edgewood Contracting Co*. 416 F.2d 1081, 1084 (5th Cir. 1969),
>
> > [t]he policy considerations which underlie res judicata–finality to litigation, prevention of needless litigation, avoidance of unnecessary burdens of time and expense–are as relevant to the administrative process as to the judicial. Nor is there any difference in the underlying principles because the administrative decision is sought to be given effect in a judicial proceeding. (Citations omitted.)

Castillo, 725 F.2d at 1013.

Clearly, under SOX, the administrative procedure is of a judicial nature. Indeed, the ALJ issued a detailed 109 page Recommended Decision and Order after conducting a six day hearing in which all parties were afforded a full opportunity to adduce testimony, offer documentary exhibits, submit oral argument and file post-hearing briefs. (Doc. 7, Exhibit C, Recommended Decision and Order, at 2.).

Nothing in the legislative history or the comments contained in the promulgation of the final regulations governing SOX preclude the application of the above-mentioned judicial principles. Indeed, in the comments concerning 29 C.F.R. § 1980.114 promulgated by OSHA, the Secretary of the Department of Labor opined:

> This provision authorizing a Federal court complaint [if there has been no final decision of the Secretary within 180 days of the filing of the complaint] is unique among the whistleblower statues administered by the Secretary. This statutory structure creates the possibility that a complainant will have litigated a claim before the agency, will receive a decision from an administrative law judge, and will then filed a complaint in Federal court while the case is pending on review by the Board.

> The Act might even be interpreted to allow a complainant to bring an action in Federal court after receiving a final decision from the Board, if that decision was issued more than 180 days after the filing of the complaint **The Secretary believes that it would be a waste of the resources of the parties, the Department, and the courts for complainants to pursue duplicative litigation. The Secretary notes that the courts have recognized that, when a party has had a full and fair opportunity to litigate a claim, an adversary should be protected from the expense and vexation of multiple lawsuits and that the public interest is served by preserving judicial resources by prohibiting subsequent suits involving the same parties making the same claims. *See Montana v. United States*, 440 U.S. 147, 153 (1979). When an administrative agency acts in a judicial capacity and resolve disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply the principles of issue preclusion (collateral estoppel) or claim preclusion (res judicata) on the basis of that administrative decision. *See University of Tennessee v. Elliott*, 478 U.S. 788, 299 (1986) (citing *United States v. Utah Construction and Mining co.*, 384 U.S. 894, 422 (1966). Therefore, the Secretary anticipates that Federal courts will apply such principles if a complainant brings a new action in Federal court following extensive litigation before the Department that has resulted in a decision by an administrative law judge or the Secretary. Where an administrative hearing has been completed and a matter is pending before an administrative law judge or the Board for a decision, a Federal court also might treat a complaint as a petition for mandamus and order the Department to issue a decision under appropriate time frames.**

69 F.R. 52104-01, 2004 WL 1876043 at 18-19.

In the case at bar, more than 180 days had run prior to the administrative hearing being held. Although this delay is not attributable to plaintiffs, generally, as the Secretary of Labor noted in his comments, a complainant who chooses to file in a district court does so before the ALJ conducts the administrative hearing. *Id.* at 20. Plaintiffs actively pursued and participated in the tremendous outlay of time and expense that occurred by virtue of a six day hearing knowing that they had the right prior to its commencement to pursue these claims directly in federal court. Instead, they sought and obtained an administrative remedy. While the granting of jurisdiction in this Court pursuant to SOX is clear, there is no indication that Congress intended for the above-cited rules of law–issue

preclusion, collateral estoppel and the inherent right to stay an action pending an administrative decision–be suspended. Indeed, the Department of Labor specifically stated that it did not include the preclusion principles in the regulations because "the statute did not delegate authority to the Secretary to regulate litigation in the Federal district courts." *Id.*

Indeed, the factual scenario found herein is in direct contrast to that found in *Hanna v. WCI Communities, Inc.*, 348 F. Supp.2d 1322 (S.D.Fla. 2004). Unlike *Hanna*, plaintiffs have litigated this matter fully before the ALJ, and had even requested a review by the ARB. Clearly, to interpret the plain language of 28 U.S.C. §1514A(b)(1)(B) to mandate a *res novo* adjudication after such extensive litigation, that is simply to re-litigate this case in its entirety, would lead to an absurd result. Thus, this Court is permitted to look beyond the plain language of this statute to avoid this needless duplication of effort. *United States v. Retirement Services Group, et al.*, 302 F.3d 425, 435 (5th Cir. 2002). This conclusion is buttressed by the Secretary of Labor's comments recognizing such pitfalls in the statutory language and by the fact that the legislative history of SOX is silent regarding the interpretation of this provision, *Hanna*, 348 F. Supp.2d at 1329. There is no provision in the statute or the regulations which even remotely evidences that Congress intended to prohibit the Court from exercising its long established inherent powers. Thus, the Court finds under the facts of this case that the Court will exercise its inherent authority to stay these proceedings and issue a mandamus to the Department of Labor to re-instate the proceedings within fourteen days and to issue a ruling on the Rule to Show Cause Order of May 16, 2005 within 15 days thereafter, and must rule on the merits of the appeal on or before 90 days from the entry of this Order and Reasons in the event the Rule to Show Cause is denied. Accordingly,

IT IS ORDERED that the Motion for Summary Judgment is **DENIED**, but the petition for mandamus is **GRANTED**.

IT IS FURTHER ORDERED that the Administrative Review Board **REINSTATE** In the Matter of Patricia A. Allen, Laura L. Waldon and Dana Breaux, 2004-SOX-60, 2004-SOX-61 and 2004-SOX-62 within 14 days of the entry of this order and issue a ruling on the Rule to Show Cause issued on May 16, 2005, within 15 days thereafter, and must rule on the merits of the appeal on or before 90 days from the entry of this Order and Reasons in the event the Rule to Show Cause is denied.

IT IS FURTHER ORDERED that this matter is **STAYED AND STATISTICALLY CLOSED** pending further order of this Court by motion of counsel.

New Orleans, Louisiana, this 6th day of April, 2006.

STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT COURT JUDGE