IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND, NORTHERN DIVISION

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DAVID R. STONE,

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Plaintiff,

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v. CIVIL NO.: WDQ-07-3191

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INSTRUMENTATION LABORATORY SpA, ET AL.,

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Defendants.

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MEMORANDUM OPINION

David R. Stone sued Instrumentation Laboratory Company ("IL SpA"), Instrumentation Laboratory Company ("ILC") (collectively, "IL"), Brian Durkin, Ann DeFronzo and Ramon Benet (collectively, the "Defendants") for whistle-blower discrimination under the Sarbanes-Oxley Act ("SOX"),[1] and violation of the Maryland Wage Payment and Collection Law.[2]

Pending are the Defendants' motion to dismiss, or alternatively, for mandamus relief and Stone's motion for discovery, motion to stay Defendants' motion to dismiss and motion to refer motions to a magistrate judge. For the following reasons, the Defendants' motion will be granted, and Stone's

[1] 18 U.S.C. § 1514A (2002).

[2] Md. Code Ann., Lab. & Empl. § 3-501 *et seq.* (LexisNexis 2007)

motions will be denied as moot.

I. Background

IL is a company that develops, manufactures and distributes critical care and hemostasis in vitro diagnostics instruments and related reagents and services for use primarily in hospital laboratories. In 1999, Stone was hired by IL as a Sales Representative; in November 2001, he was promoted to Sales Manager.

In February 2005, Stone was promoted to Director of National Accounts and started working with Group Purchasing Organizations ("GPO").[3] Stone then learned that Durkin, the Director of Sales and National Accounts, had neglected to track and pay administrative fees to GPOs resulting in misrepresentations of IL's financial condition to shareholders. From September 2005 until his termination in March 2006, Stone repeatedly voiced concerns to Durkin, Stickel and DeFronzo about deficient internal accounting controls and IL's failure to comply with SOX and other federal securities laws. On March 22, 2006, Durkin fired Stone.

On June 19, 2006, Stone filed a SOX retaliation complaint with the Occupational Safety and Health Administration ("OSHA"). On January 3, 2007, the Regional Administrator of OSHA, acting

[3] GPOs are strategic affiliations of member hospitals who concentrate buying power to get lower prices. IL sells its products to members of GPOs; if a hospital purchases IL products through a GPO, IL calculates and pays administrative fees to the GPO.

for the Secretary of Labor ("Secretary"), issued preliminary findings dismissing the complaint. On January 31, 2007, Stone objected to the preliminary findings and requested a hearing before a Department of Labor Administrative Law Judge ("ALJ").

On March 1, 2007, the Defendants filed a motion for summary decision with the ALJ, claiming that Stone had not engaged in protected activity under SOX. On September 6, 2007, the ALJ granted the Defendants' motion for summary decision and dismissed the complaint, finding that Stone's written and oral communications to IL were not protected under SOX.

On September 19, 2007, Stone sought review of the ALJ's decision by the Administrative Review Board ("ARB"). On November 8, 2007, Stone notified ARB of his intention to seek de novo review in federal district court pursuant to 29 C.F.R. § 1980.114(a), because the ARB had not issued a final decision within 180 days after his DOL complaint had been filed. On November 29, 2007, the ARB dismissed Stone's appeal. On November 26, 2007, Stone filed suit in this Court.

II. Analysis

A. Motion to Dismiss

The Defendants contend that the Court should either dismiss Stone's case for collateral estoppel, or grant mandamus relief by staying this case and ordering the ARB to render a final decision within a specified time. The Defendants assert that during the

administrative proceedings Stone had a full and fair opportunity to litigate whether he had engaged in protected activity under SOX; therefore, re-litigation of the issue in this Court would be duplicative and wasteful. Stone counters that his claim is not precluded by collateral estoppel because: (1) the ALJ's decision was not final; (2) he was not afforded a full and fair opportunity to litigate before the ALJ; and (3) the legislative policy enacted in SOX favors an independent determination in this Court.

The Sarbanes-Oxley Act provides that "no company subject to the Securities Exchange Act of 1934 may discharge or discriminate against an employee who lawfully cooperates with an investigation concerning violations of the Act or fraud against shareholders." 18 U.S.C. § 1514A(a); 29 C.F.R. § 1980.114(a). A person who alleges unlawful discharge or discrimination may bring an enforcement action under 18 U.S.C. § 1514A(b). The employee must file the complaint with OSHA,[4] within 90 days of the date one which the violation occurred. 18 U.S.C. §§ 1514A(b)(1)(A) & (b)(2)(D). The SOX regulations provide for an investigation, an administrative law judge hearing, a review by an administrative review board, and appeal to the Circuit Court of Appeals. 29

[4] The statute provides that an employee must file a complaint with the Secretary of Labor. 18 U.S.C. § 1514A(b)(1)(A). The Secretary of Labor has delegated that responsibility to OSHA. *See* 29 C.F.R. § 1980.103(c).

C.F.R. § 1980. If a final administrative decision is not issued 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," the claimant may bring a civil action in federal district court. 18 U.S.C. § 1514A(b)(1)(B). The employee must also file a notice of complaint with the administrative law judge or ARB 15 days before filing the complaint in district court. 29 C.F.R. § 1980.114(b).

The Department of Labor ("DOL") has recognized the authority of federal courts to dismiss cases based on preclusion principles. Specifically, the Secretary's comments to the SOX regulations state the following:

> 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 resolves 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 . . . on the basis of that administrative decision. *See University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) (*citing United States v. Utah Constructions and Mining Co.*, 384 U.S. 394, 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.
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> 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, 69 Fed. Reg. 52,104, 52,112 (Aug. 24, 2004) (codified at 29 C.F.R. 1980).

Collateral estoppel applies if the party asserting it establishes that: (1) the issue precluded is identical to one previously litigated; (2) the issue has been actually determined in a prior proceeding; (3) determination of the issue was a critical and necessary part of the decision in the prior proceeding; (4) the prior judgment was final and valid; and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308, 1311 (4th Cir. 1987). Thus, if "an administrative agency [was] acting in a judicial capacity and resolve[d] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," collateral estoppel is appropriate. *Jones v. SEC*, 115 F.3d 1173, 1178 (4th Cir. 1997) (*quoting Utah Constrs.*, 384 U.S. at 422).

As the SOX regulations and DOL's comments were recently enacted, there is little case law on this issue. In *Allen v.*

*Stewart Enterprises, Inc.*, No. 05-4033 (E.D. La. Apr. 6, 2006), the district court stayed its proceedings, remanded the proceedings to the DOL and compelled the ARB to rule on the merits of the complainant's appeal. *See* Defs.' Mot. to Dismiss Ex. G. The *Allen* court looked beyond the statute's plain language to principles of issue preclusion and found that relitigating the case after the complainant had fully litigated it before the ALJ[5] and requested ARB review by the ARB would be absurd. The court also noted that its ruling was consistent with the DOL's comments to the SOX regulations and nothing in the legislative history precluded collateral estoppel.

However, in *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1322 (S.D. Fla. 2004), the court denied the defendant's motion to dismiss the plaintiff's SOX claim, holding that OSHA's preliminary findings were entitled to neither res judicata nor collateral estoppel effect. The *Hanna* court noted that OSHA's preliminary order was not based on the resolution of disputed facts, and the parties had not had a fair and adequate opportunity to litigate their theories in an administrative forum. The court also stressed that there had been no decision by either an ALJ or the ARB; therefore, neither res judicata nor collateral estoppel was appropriate.

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[5] The ALJ issued a 109 page Recommended Decision and Order after conducting a six day hearing during which all parties were afforded an opportunity to adduce evidence and submit argument.

In this case, more than 180 days passed between the time Stone filed his complaint with the DOL and the Secretary issued a final decision. Thus, Stone was permitted to file suit in federal court. However, unlike the plaintiff in *Hanna*, Stone has received an ALJ decision that he has not engaged in protected activity under SOX and has appealed to the ARB before suit in this Court. Stone has also had an opportunity to fully litigate his claims, as he filed voluminous briefs, declarations and supporting exhibits in opposition to the Defendants' motion for summary decision, which were considered by the ALJ in his 24-page decision.

Still, Stone argues that he was not afforded an adequate opportunity to litigate his claims because the ALJ dismissed his complaint without discovery and a hearing. The ALJ correctly denied Stone's Rule 56(f) motion because discovery was not necessary to resolving the legal question whether he had engaged in protected activity under SOX. Stone needed only to describe his communications and statements and demonstrate that they were protected under SOX, rather than focus on the Defendants' alleged conduct. Because Stone could offer affidavits and exhibits to set forth his conduct, the ALJ correctly concluded that neither discovery nor a hearing was necessary.

Stone's assertion that the ALJ's decision was not final for purposes of collateral estoppel is also without merit. The ALJ's

adjudication of the case, i.e., granting the Defendants' motion for summary decision, led to a final judgment on the merits. *See Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986) (stating that "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties"); *see also* Restatement (Second) of Judgments § 27 (1982).

As Stone has had a full and fair opportunity to litigate his claims before an ALJ, which resulted in a final judgment on the merits, it would be wasteful to relitigate these claims in this Court. Accordingly, the Defendants' motion to dismiss will be granted. The Court will stay these proceedings and issue a mandamus to the DOL to re-instate the proceedings within fourteen days and order the ARB to rule on the merits of Stone's appeal within 90 days of entry of this Order.

III. Conclusion

For the above stated reasons, the Defendants' motion will be granted, and Stone's motions will be denied as moot.

July 1, 2008
Date

/s/
William D. Quarles, Jr.
United States District Judge