U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 16 February 2005

Case No.: 2005-SOX-1

IN THE MATTER OF

JOHN NIXON,
Complainant

vs.

STEWART & STEVENSON SERVICES, INC.,
Respondent

DECISION& ORDER

PROCEDURAL BACKGROUND

Setting

This matter involves a complaint under the Sarbanes-Oxley Act of 2002[1] (the Act), and the regulations promulgated pursuant thereto[2] brought by John W. Nixon (Complainant) against Stewart & Stevenson Services Inc. (Respondent).

Chronology

15 Jul 04: Complainant's attorney filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging Respondent terminated Complainant in violation of the Act on 20 Apr 04.

22 Sep 04: OSHA notified Complainant's attorney that it had investigated the allegations and was dismissing the complaint.

6 Oct 04: Complainant, now acting pro-se, sent a letter requesting an appeal of his case to the Office of Administrative Law Judges.

[1] Corporate and Criminal Fraud Accountability Act, P.L. 107-204 at 18 U.S.C. § 1514A et seq.
[2] 29 C.F.R. Part 1980

12 Oct 04: I established a discovery schedule and set the case to be heard on 23 Nov 04.

22 Oct 04: I conducted a conference call with Complainant and Respondent's counsel. Both sides said they wanted to keep the November hearing date. Complainant requested an extension of time to file his specific pleadings.

27 Oct 04: Complainant filed a letter (hereinafter referred to as his complaint) specifying the basis for his claim and the remedies he seeks.

4 Nov 04: Respondent filed its answer to the complaint and a request for a telephone conference to address Complainant's failure to make himself available for a deposition.

8 Nov 04: I conducted a conference call with Complainant and Respondent's counsel. Complainant requested a continuance in the case. He stated he had been unemployed, but had finally received a contract to conduct an environmental audit. The loss of that contract would place a significant financial hardship on him. He also indicated that conducting the audit would make it impossible for him to participate in a hearing on 23 November. Respondent's counsel opposed the motion. Complainant said he understood and agreed that any continuance would toll the 180 day deadline for a final agency decision in 29 CFR §1980.114, and extend the period before he could file his complaint in federal court. He also indicated he would like to conduct additional discovery, in the form of additional depositions. I informed the parties that the next available trial date would be 19 Jan 05. Complainant agreed to that date, but Respondent's counsel objected. I set new discovery dates and granted the delay.

5 Jan 05: Respondent filed a motion for summary disposition and dismissal.

11 Jan 05: Complainant filed a "multipurpose document." It notified the parties of his address change, complained that Respondent had not adequately responded to his interrogatories, and answered Respondent's motion for summary decision.

14 Jan 05: I conducted a conference call with Complainant and Respondent's counsel. Complainant indicated that he had not received Respondent's responses to his interrogatories. Respondent's counsel stated the responses had been timely sent, but to Complainant's old address. Complainant agreed that it was likely that the responses had not yet been forwarded to him. Respondent offered to resend the documents, but there was only one business day between the conference call and the set hearing date. Complainant argued that he needed the documents to adequately respond to Respondent's motion to dismiss. I suggested that the summary disposition motion aside, without complete discovery, the case was not ready to be tried on 19 January, and I was inclined to continue the case to allow Complainant to amend his reply to the summary disposition motion based on any new information in the discovery. Complainant agreed, but

Respondent opposed. Complainant said he understood and agreed that any additional continuance would further toll the 180 day deadline for a final agency decision in 29 CFR §1980.114, and extend the period before he could file his complaint in federal court. I continued the case to 7 Feb 05.

18 Jan 05: Complainant filed a letter complaining that Respondent was still failing to respond to his discovery requests and moving to dismiss Respondent's motion for summary decision.

19 Jan 05: Complainant filed a letter making a motion to compel Respondent to respond to interrogatories.

24 Jan 05: Complainant filed an amended answer to Respondent's motion for summary decision.

25 Jan 05: Complainant filed a letter stating that he had received Respondent's response to his interrogatories, but that it failed to provide the requested information. He also asked that his 28 Jan 05 deposition be delayed until Respondent complied with his discovery requests.

27 Jan 05: Respondent filed a letter requesting a conference call to address Complainant's requested discovery of attorney-client communications, confidential documents, and internal e-mails relating to air quality issues before Complainant was hired; and Complainant's cooperation in his deposition.

2 Feb 05: I conducted a conference call with Complainant and Respondent's counsel. Complainant stated that he had received the materials in response to his request. He indicated he understood that attorney-client communications materials he sought are not discoverable and that classified/confidential documents he requested could not be sent to him, but were available for his inspection and review. Complainant indicated he needed e-mails relating to Respondent's air quality testing in order to establish that he was competent in air quality issues. Respondent responded that the e-mails were sent before Complainant was hired and did not discuss him at all. The e-mails do show that Respondent was addressing air quality compliance issues in the period before it hired Complainant. Respondent argued that since it does not dispute that fact, the e-mails are not material to a fact in dispute. Given that predicate, Complainant did not object to their non-disclosure. Complainant also indicated he did not believe he received requested materials relating to Respondent's internal control of documents. Respondent responded that it believed it had provided all responsive materials in its possession, but would re-check. I told the parties I understood that subject to that single item, all discovery obligations from Respondent to Complainant have been met.

Respondent stated that it needed to complete a deposition it had conducted with Complainant. Respondent indicated that at that deposition, Complainant failed to answer some questions and did not provide some requested documents. Complainant said he thought he had answered many questions and provided documents, but was willing to take part in another deposition, so long as the scope of the deposition was not broadened. Respondent said it simply wanted to get answers to questions it previously asked and documents it previously requested. Respondent's counsel also stated that one of his witnesses would not be available on 7 Feb 05, and requested a delay. When asked if he opposed the delay, Complainant replied that he was "just along for the ride." When I assured him he was not and asked again if he wanted to voice any opposition he did not. Since he did not oppose the delay, and since the need for delay was based in part upon his failure to cooperate fully in his deposition, I granted a delay to 8 Mar 05.

During the same call, I also informed Complainant that I was considering Respondent's motion to dismiss and that it was important that I fully understand the basis of his complaint. Specifically, I needed to know exactly what activity protected by the act he had engaged in. I told him that I understood his complaint to be that he had forwarded information relating to what he reasonably believed to be a violation of the S.E.C. rules, specifically regulation S-K item 103, which requires companies to report certain pending legal proceedings. Complainant confirmed that currently, that was the sole basis of his complaint, but if there was an alternative basis, he would send it to me.

2 Feb 05: Following the conference call, and inconsistent with the position he took in the conference call, Complainant filed a letter moving for a voluntary dismissal of his complaint and notifying the parties of his intent to file an action in Federal District Court.

4 Feb 05: Respondent filed a reply to Complainant's answer to Respondent's summary decision motion and an answer to Complainant's motion for voluntary dismissal. Respondent also asked for the award of attorneys fees pursuant to 29 C.F.R. §1980.109(b)

7 Feb 05: Complainant filed a letter amending his complaint to include an allegation that his protected communications included information relating to Respondent's violation of 18 U.S.C. §1341 (mail fraud).

COMPLAINANT'S MOTION FOR WITHDRAWAL

Applicable Law

The Act[3] provides that complaints filed shall be subject to the procedural rules set forth in the Aviation Investment and Reform Act for the 21st Century.[4] The regulations

[3] 18 U.S.C. § 1514A(b)(2)

issued pursuant to the Act provide that "[a]t any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge. … The judge … will determine whether the withdrawal will be approved."[5]

The regulations also allow for direct access to federal district court, under specific circumstances.

> If the Board has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy.[6]

The burden is on the party opposing district court jurisdiction to establish bad faith, rather than on the complainant to establish the absence of bad faith.[7]

The regulations anticipate that parties may agree to extend the time.

> Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to a judge who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties.[8]

Analysis

There is little case law providing guidance on what constitutes "bad faith" in the context of the applicable regulations in this case.[9] However, the equitable doctrine of "clean hands" should apply. A complainant who has caused, requested, and agreed to delays in the processing of a case should not then be allowed to argue that because of those delays he no longer need exhaust his administrative remedies.

In this case, Complainant filed his complaint on 15 Jul 04.[10] His 180 day period would have elapsed on 10 Jan 05. However, on 8 Nov 05, he requested a delay in the proceeding, explaining that his recent unemployment had worked a financial hardship on him and he had finally accepted a job which would make it impossible to have the hearing on the currently scheduled date of 23 Nov 04. Respondent strenuously objected, in part not wanting to allow the 180 day period to run and be forced to re-litigate the case

---

[4] 49 U.S.C. § 42121(b) (2001); 29 C.F.R. Part 1980 (2003)
[5] 29 C.F.R. § 1980.111(c) (2003)
[6] 29 C.F.R. § 1980.114(a) (2003)
[7] Collins v. Beazer Homes USA, Inc., 334 F.Supp.2d 1365 (N.D.Ga.,2004)
[8] 29 C.F.R. § 1980.107(b) (2003)
[9] In the *Collins* case, *supra*, the delay was attributable to settlement discussions.
[10] Assuming it was faxed that day.

in district court. Complainant stated he understood that the next available date was 19 Jan 05 and the delay would toll the 180 day clock. I granted Complainant's request and set the case for 19 Jan 05. That was a 58 day delay, which if attributable to Complainant, would extend the 180 day date to 8 Mar 05.

In a conference call on 14 Jan 05, I granted another delay over Respondent's objection. The delay was a result of incomplete discovery. Complainant had changed mailing addresses without adequate prior notice to the court or Respondent. Consequently, some discovery materials were not received by Complainant in a timely fashion, if at all. I told Complainant I was hesitant to rule on Respondent's summary decision motion or conduct the hearing, for that matter, until I was sure Complainant had access to full discovery. I explained however, that the next date would be 7 Feb 05, and that in view of Respondent's objection, any delay would toll the 180 day clock. Complainant said he understood and agreed. That was a 20 day delay, which if attributable to Complainant, would extend the 180 day date to 28 Mar 05.

Finally, on 2 Feb 05, in another conference call, Respondent asked for a delay because of the availability of a key witness. Respondent also complained that it needed to re-accomplish the deposition of Complainant, because he failed to provide requested documents and answer certain questions.[11] Complainant did not oppose the delay, even when pressed by the court for a position. Since the delay was a consequence of Complainant's non-compliance in discovery, I granted a delay to 8 Mar 05. That was a 30 day delay, which if attributable to Complainant, would extend the 180 day date to 7 Apr 05.

Complainant now asks to withdraw his complaint, and intends to file his cause of action *de novo* in district court. Voluntary withdrawal would be inconsistent with the general principle of exhaustion of administrative remedies and could arguably run contrary to Complainant's expressed intent by depriving the district court of jurisdiction. If Complainant voluntarily withdraws his complaint, he can not then argue that the board has not yet issued a final decision in his case. Consequently, his motion to withdraw is denied. However, I will also consider his request as a motion to stay, pending filing with the district court.

The ultimate determination of whether or not the 180 day period has elapsed and jurisdiction is properly in district court is for that court. However, I must address it in terms of whether a stay is appropriate. I find that it is not. Complainant sought and was granted delays over strenuous Respondent opposition. He caused other delays through his failure to comply with his discovery obligations. He stated he understood and agreed

[11] *See* Exhibits 3 and 4 to Respondent's answer to Complainant's motion.

that the 180 day period would be tolled. Alternatively, his attempt to invoke the 180 limit after having informed the parties he waived such a right and obtaining a delay based on that representation, constitutes bad faith under the regulations.

I find that the 180 day period will not run until 7 Apr 05. Consequently Complainant's motion to stay/withdraw is denied.[12]

RESPONDENT'S MOTION TO DISMISS

Respondent cites two grounds for its motion to dismiss. The first is that Complainant did not engage in any activity protected by the act. The second is that even if he did, there is clear and convincing evidence that Respondent would have taken the same action in the absence of that activity.

Applicable Law

The Act prohibits covered employers from taking adverse actions (including discharge, demotion, suspension, threats, harassment, or any other of manner discrimination) against an employee in the terms and conditions of employment against employees "because of" the employee's protected activity.[13]

The Act defines protected activity as

> (a) …any lawful act done by the employee
>
> (1) to 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 section 1341*[using Postal Service or interstate commerce for frauds and swindles]*, 1343 *[using interstate commerce wire, radio or television for frauds]*, 1344 *[bank fraud]*, or 1348 *[securities fraud]*, and EPA/SEC reporting requirements, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct);
>
> …[14]

[12] However, given that (even by my interpretation of the law) the Board must issue a final decision by 7 Apr 05, Complainant will, in all probability, be able to seek a *de novo* hearing in district court in any event.
[13] 18 U.S.C. §1514A (2003)
[14] 18 U.S.C. §1514A (2003)

The S.E.C. regulation cited by Complainant sets forth filing requirements.

> Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities.[15]

The instructions to the regulation further define the mandated reports.

> 5. Notwithstanding the foregoing, an administrative or judicial proceeding (including, for purposes of A and B of this Instruction, proceedings which present in large degree the same issues) arising under any Federal, State or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primary for the purpose of protecting the environment shall not be deemed "ordinary routine litigation incidental to the business" and shall be described if:A. Such proceedings is material to the business or financial condition of the registrant;B. Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or C. A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than $100,000; provided, however, that such proceedings which are similar in nature may be grouped and described generically.[16]

Complainant amended his complaint to include an allegation that he reasonably believed Respondent was violating 18 USC § 1341. It provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

[15] 17 C.F.R. §229.103 (2005), (S.E.C. Regulation S-K, item 103)
[16] *Id.*

A key element of the mail fraud offense is that the scheme or artifice must be for the purpose of obtaining money or property.[17] A permit to operate a waste dump site does not constitute "money or property" within the meaning of the statute.[18] A fraudulent application for a license to operate video poker machines, did not constitute mail fraud, since the state's core concern in issuing licenses is regulatory[19]

The regulations address the statutory requirement that the adverse action be "because of" the protected activity.

> A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior.[20]

Thus, to make a *prima facie* case, an employee must establish by a preponderance of the evidence that: (1) the employee engaged in protected activity as defined by the Act; (2) the employer was aware of the protected activity; (3) the employee suffered an adverse employment action, such as discharge; and (4) circumstances exist which are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action.[21] Temporal proximity can be sufficient to establish the protected activity was a contributing factor.[22]

Once an employee meets this burden, he or she is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior.[23]

---

[17] Cleveland v. U.S., 531 U.S. 12 (2000); There is an exception for cases in which the scheme was to deprive another of "honest services." It typically involves bribery offenses and is not applicable in this case. *See, e.g.,* U.S. v. Reyes, 239 F.3d 722 (5th Cir. 2001); U.S. v. Gray, 96 F.3d 769 (5th Cir. 1996)

[18] U.S. v. Novod, 923 F.2d 970 (2nd Cir. 1991) *on rehearing* 927 F.2d 726 (2nd Cir. 1991), *cert. denied*, 500 U.S. 919 (1001)

[19] U.S. v. Cleveland, 531 U.S. 12 (2000)

[20] 29 C.F.R. § 1980.109(a) (2003)

[21] Collins v. Beazer Homes USA, Inc., 334 F.Supp.2nd 1365 (N.D. Ga. 2004); *See also* Macktal v. U.S. Dept of Labor, 171 F.3d 323, 327 (5th Cir. 1999)(ERA case)

[22] 29 C.F.R. §1980.104(b); Collins v. Beazer Homes USA, Inc., 334 F.Supp.2nd 1365 (N.D. Ga. 2004); *See also* Bechtel Constr. Co. v. Sec'y of Labor, 50 F.3d 926 (11th Cir.1995) (ERA case)

[23] 29 C.F.R. 1980.109(a); *See also* Trimmer v. U.S. Dep't of Labor, 174 F.3d 1098, 1101-02 (10th Cir. 1999) *and* Dysert v. Sec'y of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997) (ERA cases)

The regulations incorporate by reference procedural rules for hearings conducted under the Act. "Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges codified at subpart A, part 18 of title 29 of the Code of Federal Regulations."[24]

Parties are allowed to seek a summary decision without a full hearing.[25] They are entitled to a summary decision if:

> …the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.[26]
>
> Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion 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.[27]

In a motion for summary disposition the moving party has the burden of establishing the "absence of evidence to support the nonmoving party's case".[28] In reviewing a request for summary decision, all of the evidence must be viewed in the light most favorable to the nonmoving party.[29]

Analysis

PROTECTED ACTIVITY

Complainant's theory appears to be primarily based on his belief that the state Privilege Act did not apply to the environmental audit Respondent conducted. Therefore, Respondent would be subjected to enforcement actions and significant penalties and fees. The failure to report those enforcement actions and fines constituted the SEC rule violations and the letters sent by Respondent to the state claiming that it did qualify for immunity constituted the mail fraud.

---

[24] 29 C.F.R. § 1980.107(a) (2003)
[25] 29 C.F.R. § 18.40 (2003)
[26] 29 C.F.R. §§ 18.40(d), 18.41(a) (2003)
[27] 29 C.F.R. § 18.40(c) (2003)
[28] Wise v. E.I. DuPont De Nemours and Co., 58 F.3d 193 (5th Cir. 1995)
[29] Anderson v. Liberty Lobby, 477 U.S. 262 (1986)

SEC Rule Violation

Complainant's complaint alleges he suffered retaliation in violation of §806 of the act and that Respondent also violated §§ 301, 404, 807, 902, 1107, and 1519 of the Act.[30] He goes on to allege:

> CLAIM 5: The Company knowingly altered, concealed and/or falsified documents with the intent to impede, obstruct, and/or influence the investigation of a federal grand jury[31]; and
>
> CLAIM 6: The Company knowingly executed a scheme to defraud auditors and shareholders by, among other things, knowingly and intentional circumventing the controls; thereby impeding independent and rapid disclosure of fraudulent behavior pursuant to sections 301, 404, and 409 of the Act.[32]

The complaint continues that after disclosing his environmental audit to management on 15 Mar 04, Complainant reasonably believed that Respondent's "historical pattern of illegal environmental, health, and safety activities…would have led and will eventually lead to legal proceedings" that meet the reporting threshold.[33]

It goes on to allege: that Complainant's audits uncovered over 12 years of environmental violations by Respondent; that the penalties for those violations would lead to fines and penalties which would be required to be reported under SEC regulations; that Respondent impeded a federal investigation into the "merits of this case;" and that Respondent schemed to circumvent controls and impede disclosures of fraud and inappropriate environmental conduct that have material impact on Respondent's financial reporting.[34]

In support of the general allegations, Complainant listed 13 specific facts.[35] He alleges that:

1. In July 2003, Respondent's internal audits disclosed long standing environmental violations. Respondent sought Federal EPA protection under their audit policy and agreed to hire a full-time Environmental Manager.

2. In August 2003, Respondent had a fish kill in a retention pond that it did not report to the state.

---

[30] Complaint p.1; the reference to §1519 is most probably a reference to the codification of §806 at 18 U.S.C. §1514A . The allegations of violations of sections other than 806 of the Act are not subject to my jurisdiction.
[31] Complainant has submitted nothing in response to the summary decision motion that substantiates or supports this allegation.
[32] Complaint p.2
[33] *Id.* p.2
[34] *Id.* p.3
[35] *Id.* pp.3-5

3. In September 2003, Respondent hired Complainant.

4. From October to December 2003, Complainant found various environmental problems and violations. Complainant provided a penalty schedule to his supervisor who began to avoid contact with Complainant. Respondent solicited outside attorneys to help.

5. In January of 2004, Complainant and the outside attorneys discovered more potential violations. They initiated an audit privilege with the state. Respondent asked Complainant to lead its facility in environmental certification.

6. On 3 Feb 03, outside counsel confirmed the illegal dumping of hazardous wastes and recommend comprehensive environmental audits. Complainant's supervisor gave Complainant a verbal warning.

7. On 17 Feb 04, the formal advice from the outside attorneys arrived. Complainant told his supervisor that the state privilege might not apply to federal enforcement actions.

8. On 18 Feb 04, Complainant's supervisor placed him on a performance improvement plan and ordered him to have no further contact with outside counsel or state and federal agencies.

9. On 15 Mar 04, Complainant forwarded his audit findings and EPA/SEC reporting requirements to Respondent management. He believed that civil penalties would be pursued by the state.

10. On 19 Mar 04, a senior Respondent manager visited the facility and validated the audit findings. Complainant's supervisor ordered him to stop the audits.

11. On 25 Mar 04, Complainant's supervisor discouraged him from applying for a new Environmental Health and Safety Manager position.

12. On 8 Apr 04, Complainant was told that his supervisor was building a file on him.

13. On 20 Apr 04, Complainant's employment was terminated.

Respondent is entitled to a summary decision and dismissal if there is no genuine issue of fact that Complainant did not engage in protected activity. Both in his complaint and again in our last conference call Complainant confirmed that his cause of action is based on SEC Regulation S-K, item 103. Accordingly, a critical issue of fact for the

purposes of this motion is whether Complainant provided information that he reasonably believed concerned Respondent's failure to report either pending legal proceedings or legal proceedings known to be contemplated by governmental authorities.

In its motion, Respondent argues that there were no such proceedings. In support it offers an affidavit from Complainant's supervisor that there was no pending lawsuit related to the environmental issues in Complainant's audit. Respondent also submitted an affidavit from its Executive Vice President for Human Resources that Respondent was immune from such proceedings by virtue of its voluntary disclosure to the state of Complainant's audit findings. In response, Complainant submitted a number of e-mails and other documents, including a December 2004, from the state informing Respondent that immunity does not apply to some of the violations disclosed.

However, the ultimate issue is not whether or not Respondent committed environmental violations or whether or not immunity does apply. It is whether, at the time of his communications, under the facts, as Complainant could have reasonably believed them to be, there was either a pending legal proceeding or governmental authorities were contemplating a legal proceeding. Based on the record, there is no genuine issue of fact as to this question.

Even viewing the evidence in the light most favorable to Complainant and accepting his 13 factual assertions at face value, there is no evidence of a pending legal proceeding. The same is true of contemplated governmental legal proceedings. There is no evidence that any governmental agency was contemplating legal proceedings beyond the general construct that all agencies contemplate the possibility of enforcement actions in every case. In fact, had Respondent attempted to report any such proceedings in accordance with the rule, it would have been forced to guess or estimate the specific court/agency involved, the basis of the action, and the relief sought.

The best evidence of what Complainant believed comes from his own words in his own complaint. He believed Respondent's "historical pattern of illegal environmental, health, and safety activities…would have led and will eventually lead to legal proceedings." While that may or may not be true in the long run, there is no genuine issue of fact in the record that at the time of his communications, Respondent's actions had not yet led to the point where legal proceedings were either pending or contemplated by governmental authorities. Complainant's belief that government agencies would soon be contemplating proceedings is not the same as a belief that they actually were contemplating proceedings. The former is what the evidence shows. The latter is what the statute requires.

Applying all procedural rules and evidentiary presumptions and assumptions in Complainant's favor, there is still no genuine issue of fact that he did not reasonably believe government agencies were at that time contemplating proceedings. Accordingly, there exists no genuine issue of fact, which if decided in Complainant's favor, would allow a fact finder to determine that Complainant was providing information regarding conduct that he reasonably believed to be a violation of SEC Rule S-K.

Mail Fraud

On 7 Feb 05, Complainant filed an amendment to his complaint, adding an allegation that he also reasonably believed that Respondent was violating the federal mail fraud law. He cited five specific letters.

1. A 30 Jan 04 letter from Respondent notifying the state of its intent to perform a voluntary environmental audit and avail itself of the protections of the privilege act.

2. A 24 Feb 04 letter from Respondent to the state stating that the audit disclosed a hazardous waste disposal violation.

3. A 12 Jul 04 letter from Respondent to the state requesting a 30-day extension in the audit period.

4. A 31 Aug 04 letter from Respondent notifying the state of its completion of the audit.

5. A 1 Nov 04 letter from Respondent's attorney to the state arguing that it is immune to enforcement action because the violations were discovered pursuant to the voluntary audit under the privilege act.

Since the last three letters were all sent after Complainant's communication and termination, they cannot constitute the predicate for his argument that he reasonably believed (at the time of his communication) that Respondent was engaged in mail fraud. Complainant's amended complaint asserts that the 30 Jan 04 letter was false in that it stated that the planned audit was under the voluntary discloser provisions of the Privilege Act, when in fact it did not qualify, since an earlier investigation had been conducted. He argues that the 24 Feb 04 letter is false in that in claims the audit discovered a violation, which, in truth, had been previously discovered.

For Complainant to come within the Act as to the mail fraud violations, he must have reasonably believed that Respondent knew the letters were false. However, there is a more fundamental problem with Complainant's argument. Assuming for the purposes of summary disposition that Complainant reasonably believed Respondent sent the letters and knew the information contained within them was false, and accepting all of Complainant's facts as true, the actions still do not constitute mail fraud. There is no evidence that the letters were part of a scheme or artifice to obtain money or property. Moreover, no evidence in the record exists that indicates that at the time, Complainant considered Respondent's conduct to constitute the offense of federal mail fraud. The first mention of the mail fraud statute was in his last filing in response to (and days after) a conference call during which I asked if there was any other basis for his claim beyond the SEC Rule violation.

There exists no genuine issue of fact, which if decided in Complainant's favor, would allow a fact finder to determine that Complainant was providing information regarding conduct which he reasonably believed to be mail fraud.

Accordingly, Respondent is entitled to summary decision and dismissal on the issue of protected activity.

ADVERSE ACTION IN THE ABSENCE OF THE COMMUNICATION

To prevail on this basis, Respondent must show that even if all evidence is viewed in the light most favorable to Complainant and every genuine issue of fact is decided in favor of Complainant, the record still shows by clear and convincing evidence that Respondent would have taken the same unfavorable personnel action in the absence of any protected behavior. Given the permissive inference of temporal proximity, which must be taken in Complainant's favor at this stage, the nature of the issues involved, and the procedural burden, I find that the record fails to establish a sufficient basis for a summary decision on this issue.

Accordingly, Respondent is not entitled to summary decision and dismissal on the issue of non-prohibited motive.

RESPONDENT'S MOTION FOR FEES

Applicable Law

"If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding $1,000.00."[36]

Given the recent passage of the statute and still developing body of law interpreting it, courts must take care not to chill claims that involve controversial, doubtful or even novel questions.[37]

Analysis

I do not find that Complainant's filing of this action or his actions in litigating it were motivated by animus, bad faith, or a desire to vex Respondent. Consequently, I do not find that the assessment of fees is appropriate in this case.

ORDER

Consistent with the above:

Complainant's motion to withdraw is **DENIED**.
Respondent's motion to dismiss is **GRANTED**.
Respondent's motion for attorney's fee is **DENIED**.

The hearing scheduled on **Tuesday, March 8, 2005** at **9:00 a.m. in Houston, Texas** is **CANCELED**.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

[36] 29 C.F.R.§1980.107(b)
[37] *See, e.g.,* Wilton Corp. v. Ashland Castings Corp.,188 F.3d 670 (6th Cir. 1999)

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).