U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, Louisiana 70433

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 24 July 2006

Case No.: 2005-SOX-46

IN THE MATTER OF

DR. DANIEL ULIBARRI,
Complainant

vs.

AFFILIATED COMPUTER SERVICES,
Respondent

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Case No.: 2005-SOX-47

IN THE MATTER OF

ELENA MASON,
Complainant

vs.

AFFILIATED COMPUTER SERVICES,
Respondent

ORDER TO DISMISS

PROCEDURAL BACKGROUND

This matter involves a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002[1] (the Act) and the regulations promulgated pursuant thereto[2] brought by Complainants, Daniel Ulibarri and Elena Mason against Respondent Affiliated Computer Services (ACS).

[1] 18 U.S.C. § 1514A *et seq.*
[2] 29 C.F.R. Part 1980.

On or about 8 Nov 04, Complainants filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent violated their rights under the Act. OSHA conducted an investigation and issued its findings on or about 23 Mar 05. Following a bifurcated formal hearing at which only the issue of binding arbitration was addressed, I issued a decision staying the proceeding in order for the parties to enter arbitration. I also directed Respondent to provide an arbitration status report to this Court with a copy to Complainants, starting on 1 Mar 06 and every 45 days thereafter with a final report and motion to dismiss not later than 15 days after conclusion of the arbitration.

On 24 Feb 06, Respondent filed an update stating Complainants' Counsel had not returned Respondent's Counsel's call about initiating arbitration. Respondent moved for the issuance of an order setting a deadline for Complainants to declare their intentions as regards this case. I issued an order for Complainants to show cause why the complaint should not be dismissed.

In response, Complainants filed a letter describing their frustrated attempts to begin the arbitration process and asking for help from Respondent. Complainants had been without an attorney for a period and needed assistance. In a conference call on 31 Mar 06, Complainant stated that they had repeatedly tried to contact Respondent about initiating arbitration, but never received a reply. Upon further discussion, it appeared that a bad e-mail address was the problem. Complainants stated that they now had an attorney, could pay the $125 filing fee, and could begin the arbitration process. I informed the parties that no new order was required and they should proceed to arbitration, with reports as before.

On 30 Jun 06, Respondent filed a letter stating that Complainants had yet to move forward with arbitration. Respondent requested a dismissal with prejudice. On 6 Jul 06 I issued an order for Complainants to show cause why the court should not dismiss their cases for failing to proceed with arbitration. In response, Complainants filed a letter expressing their frustration with their inability to be heard within the context of the federal agency administrative process on the merits of their complaint. More importantly, they stated that they had already spent $20,000.00 litigating their case and that in order to effectively proceed with arbitration; they would need an initial minimum of $7,000.00 for attorney fees. Complainants indicated that they therefore could not pursue arbitration.

DISCUSSION

While they might well be much better off with counsel, the record does not indicate that Complainants are required to have one in order to proceed with arbitration. The same would be true of proceeding to a hearing on the merits in front of an Administrative Law Judge. The fact that they would prefer to have an attorney but cannot afford one does not change the previous holding that the issue is subject to mandatory arbitration. It appears that Complainants' stated intent to not pursue arbitration is not in any way attributable to a breach by Respondent of the agreement to arbitrate. That leaves the court with only one rational option. Holding the matter open in anticipation of a remote possibility that Complainants' would change their minds is unreasonable and does not recognize their actions as either an actual breach or anticipatory breach of the binding contract to arbitrate.

The complaints are **DISMISSED**.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

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).

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).