U.S. Department of Labor

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Issue Date: 18 September 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 ON MOTION TO RECONSIDER

PROCEDURAL BACKGROUND

This matter involves a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (the Act)[1] 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 no later than 15 days after conclusion of the arbitration.

On 24 Feb 06, Respondent filed a status report 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 to 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 no longer had an attorney and needed assistance. In a conference call on 31 Mar 06, Complainants 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 status reports as before.[3]

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 dated 16 Jul 06 and received 19 Jul 06, 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 litigating their case and that in order to effectively proceed with arbitration they would initially need a minimum of $7,000 for attorney fees. Complainants indicated that they therefore could not "pursue the matter as outlined by the ALJ." Based on that apparent clear intent to abandon arbitration, the Court dismissed the case in an order dated 24 Jul 06.

[3] Ultimately, Complainants did not retain new counsel and have continued to proceed pro se.

In a letter also dated 16 Jul 06, but actually written on 24 Jul 06 and received on 31 Jul 06, Complainants stated they were not withdrawing but rather arguing for the first time that the mandatory arbitration clause in their employment contract did not apply to complaints filed with government regulatory agencies. Respondent filed a responsive letter on 8 Aug 06, asking the Court to disregard the letter as *ex parte* and untimely, as well as substantively incorrect.[4]

Complainants filed a motion to reconsider on 23 Aug 06 and Respondent filed a timely opposition. In that opposition Respondent also requested attorneys' fees and costs.

DISCUSSION

Proceedings under the Act are conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges.[5] In situations not controlled by those rules, any statute, or any executive order, the Rules of Civil Procedure for the District Courts of the United States apply.[6]

The implementing regulations under the Act do not specifically provide for motions to reconsider decisions issued after formal hearings.[7] They do address the effect of the filing of such motions on the deadline for the filing of appeals.[8] Those rules implicitly give a party 10 days after the decision to file a motion to reconsider.[9] The Rules of Civil Procedure for the District Courts of the United States apply in any situation not provided for or controlled by any regulations or statutes.[10]

To promote complete litigation in the first instance and avoid protracted post-trial motion practice, the courts have limited such motions. They are appropriate if the moving party can present newly discovered evidence not available at the time of hearing, the law has changed in the interim, or the record shows a manifest error of law or fact.[11]

Timeliness

Respondent's argument that Complainants are not timely in their motion is based on an assumption that the 13 Jan 06 order was a decision within the meaning of the

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[4] Complainants did not serve Respondent, but the Court provided a copy to Respondent.
[5] 29 C.F.R. §1980.107(a).
[6] 29 C.F.R. §18.1(a).
[7] *See* 29 C.F.R. §18.4.
[8] 20 C.F.R. §1980.110(a).
[9] 20 C.F.R. §1980.109(c).
[10] 29 C.F.R. §18.1.
[11] *See e.g.,* Matter of Prince, 85 F.3d 314, (7th Cir. 1996) *cert. den.* 519 U.S. 1040 (1996); *Deutsch v. Burlington Northern R. Co.*, 983 F.2d 741 (7th Cir. 1992) *cert. den.* 507 U.S. 1030 (1993).

regulation imposing a ten day deadline for appeal. However, that decision was merely a stay and while possibly subject to an interlocutory appeal, it was not a "decision" as contemplated by the regulations. Respondent's suggestion that Complainants could have and should have raised their motion to reconsider in the six months following the stay is a fair observation, but related more directly to an equitable argument of laches or as a fact to consider on the merits of their motion. Nonetheless, since Complainants filed for reconsideration within ten days of the decision to dismiss, their request is timely.

Merits of Complainants' Motion

The Applicability of the Contract to Arbitrate This Dispute

At its most basic level, Complainants' argument is that they would like to reverse a strategic decision they candidly admit they discussed with their counsel and in which they acquiesced to his judgment earlier in the litigation. At the bifurcated formal hearing, the issue was the applicability of a compulsory arbitration clause in Complainants' employment contract. On the record, I specifically clarified what issues were in dispute and subject to litigation.

> JUDGE ROSENOW: …You're not saying that the -- that if -- you're not saying that there was -- that your clients are not bound by a contractual obligation to take this to arbitration from -- at the beginning.
>
> You're saying even if that contract did exist from the beginning, they breached it. And you mentioned a bunch of things -- a bunch of reasons that you think broke the -- your -- you know, that breached the contract, that your clients are no longer bound by that contract.
>
> And that's why you don't have to go to arbitration, and you can seek your relief under this form. Right?
>
> MR. DEAGUERO: Our --
>
> JUDGE ROSENOW: Okay. And I anticipate -- don't let me put words in your mouth, though. I'm just trying to get -- you know, get to the endpoint -- that what I'm going to get is a lot of evidence from you today showing those things that you believe Respondent did that basically extinguished your contractual obligation to follow the contract and to submit to arbitration.
>
> MR. DEAGUERO: That's correct.
>
> JUDGE ROSENOW: Okay.
>
> MR. DEAGUERO: But more pointedly, the -- what the -- ACS did is they effectively repudiated the agreement through --
>
> JUDGE ROSENOW: Again, that would be something that would extinguish your clients' obligation to follow the contract.
>
> MR. DEAGUERO: Yes.
>
> * * *

JUDGE ROSENOW: … What you're saying was, yes, there was a contract, but they repudiated it; they breached it; they did such things that destroyed the contract, we were no longer bound by it by the point that we got to what happened that we're talking about today.

MR. DEAGUERO: I think you've mostly correctly --

JUDGE ROSENOW: Great.

MR. DEAGUERO: -- set forth my position. However --

JUDGE ROSENOW: Okay.

MR. DEAGUERO: -- we don't concede the -- frankly, the applicability of the ADR for a very important reason. We believe that document to be -- frankly, to be a subterfuge only to be used to present to the Court.

It's not something that's really accorded to the employees. It was not accorded to my clients, and it was --

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JUDGE ROSENOW: Okay. Your understanding -- today you're going to fight about whether there was ever a valid contract, and two, whether or not they breached that contract if I do find that there was a valid contract.

MR. DEAGUERO: That's correct. [12]

Similarly, on brief, Complainants argued that the arbitration agreement was not binding under state law, it was not supported by adequate consideration or mutuality of promises, it was illusory and ambiguous, it was unconscionable, and it was breeched by Respondent. Even though Complainants apparently had specifically raised the issue with their counsel, at no point until this motion for reconsideration was any suggestion made that the contract to arbitrate did not apply to complaints to governmental enforcement agencies.

There is no suggestion that Complainants have newly discovered evidence not available at the time of hearing or that the law has changed in the interim. To the extent Complainants argue that the implicit finding of applicability of the arbitration clause to agency hearings is a manifest error, they fail to account for the fact that they, with the advice of their attorney, implicitly conceded that issue.

Now, Complainants essentially request an opportunity to revisit that decision and litigate an issue that they chose to concede while they were represented by counsel and that Respondent contests. As an aside to its primary argument of timeliness, Respondent submits that Complainants are substantively wrong and the contract language compelling arbitration did apply to complaints to governmental agencies in so far as they seek private

[12] Tr. 22-27.

remedies. Whether or not Complainants would ultimately prevail on the merits of this issue is not the central question. At this point, in order to allow Complainants to have a second chance and yet provide Respondent a full and fair opportunity to be heard would require reopening the record and conducting another formal hearing.

Denying Complainants' motion and depriving them of an opportunity to make what may have been a meritorious argument may seem a harsh consequence for a strategic decision made on the record by their attorney. Regardless, they concede that they discussed the matter with him.

This is not a case in which an attorney acted contrary to his clients' clear direction or failed to make a timely filing.[13] They discussed the matter with him and sat at the hearing as he disavowed any intention to litigate the issue. Complainants "voluntarily chose this attorney as [their] representative in the action, and [they] cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent."[14]

The Failure of Respondents to Comply with the Contract to Arbitrate

Complainant's final filing focuses on the fact that invoking the arbitration process would be much easier for Respondent than it was for them. They read the contract as obligating Respondent to initiate the arbitration process whenever a dispute arises. I do not interpret the agreement in the same way. The contract afforded Complainants the opportunity to invoke arbitration if they disputed an action by Respondent. The contract obligated Respondent to participate in the arbitration and abide by its outcome. Contrary to Complainant's argument, the agreement did not require Respondent to invoke the process on behalf of Complainants. There is nothing in the record that indicates Respondent breached its obligation under the agreement. Although now proceeding pro se, Complainants are well educated individuals who positions with Respondent should have made them sufficiently familiar with the DRP to be able to invoke the arbitration process, as they agree to do in the event of a dispute.

Attorneys' Fees

The regulations provide that a respondent may be awarded up to $1,000.00 in reasonable attorney's fees if a complaint was frivolous or was brought in bad faith.[15] I do not find that the record establishes bad faith or a frivolous complaint.

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[13] *See, e.g. Silas v. Sears, Roebuck & Co., Inc.*, 586 F.2d 382, (5th Cir.1978) (favoring disciplining an attorney rather than dismissing the client's case where a failure is plainly attributable to an attorney rather than to his blameless client).

[14] *Link v. Wabash R. Co.*, 370 U.S. 626, 633-634 (1962).

[15] 29 C.F.R §1980.109(b).

DECISION

Complainants' motion to reconsider and Respondent's motion for fees are denied.

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).