

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 09 August 2005**

**CASE NO.: 2005-SOX-00009**

**In the Matter of:**

**MAUREEN THOMAS,  
Complainant,**

**v.**

**PULTE HOMES, INC.,  
Respondent.**

**FINAL ORDER OF DISMISSAL**

The instant case was brought by Complainant Maureen Thomas ("Complainant") under the employee protection (whistleblower) provisions of the Sarbanes-Oxley Act of 2002 (the "Act"), 18 U.S.C. §1514A, with implementing regulations appearing at 29 C.F.R Part 1980. The matter now before me is Complainant's July 11, 2005 Motion for Withdrawal of her Objections in the whistleblower retaliation case against the Respondent Pulte Homes, Inc. ("Respondent").

By way of background, Complainant filed a formal complaint under the Sarbanes-Oxley Act with the Secretary of Labor on April 20, 2004. On October 15, 2004, the Occupational Safety and Health Administration ("OSHA") found that the complaint was untimely, because the complaint was filed more than ninety (90) days after the alleged adverse employment action. On November 17, 2004 Complainant filed objections to the Findings and requested a hearing with the Office of Administrative Law Judges. I issued a Notice of Assignment and Order on November 30, 2004, which directed the parties to submit position statements on the preliminary issue of whether this tribunal has jurisdiction by virtue of the statute of limitations under the Sarbanes-Oxley Act within thirty (30) days. Both parties submitted Statements of Positions on December 30, 2004 and January 3, 2005, respectively. In addition, Respondent submitted a supplemental brief on the issue on January 28, 2005. On March 17, 2005 a Conference Call was held between the undersigned and the parties to address the position statements. On March 23, 2005, I issued an Order summarizing the results of the conference and providing scheduling deadlines. Thereafter, Respondent filed a Motion for Summary Decision on May 31, 2005, and Complainant filed an Opposition to Respondent's Motion on July 6, 2005.

In the Motion now before me (entitled "Complainant's Withdrawal of Objections"), the Complainant sought to withdraw her November 16, 2004 objections to the Findings dated October 15, 2004 by OSHA dismissing her complaint against Respondent Pulte Homes, Inc. Her

request for withdrawal is premised upon the untimely filing of the initial complaint.<sup>1</sup> Under the Sarbanes-Oxley Act, a complaint must be filed within 90 days of the alleged violation. 29 C.F.R. §1980.103. Section 1980.111(c) of title 29, C.F.R provides:

(c) At 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 or, if the case is on review, with the [Administrative Review] Board. The judge or the Board, as the case may be, will determine whether the withdrawal will be approved. If the objections are withdrawn because of settlement, the settlement will be approved in accordance with paragraph (d) of this section.

Inasmuch as the Complainant admits that the initial complaint filed on April 20, 2004 was not timely, Complainant has established good cause for withdrawal of her objections to OSHA's findings. Complainant's request for withdrawal of her hearing request will therefore be granted, and this case will be dismissed with prejudice. The Findings of OSHA on October 15, 2004 that the complaint was untimely will therefore become final.

### **Sealing of the Record**

Complainant also requested that the entire record in this matter be sealed. However, Complainant failed to provide any information to support the request or to cite any supporting authority. A request for the record to be sealed may be made by requesting a protective order pursuant to 29 C.F.R. §§18.15 and 18.46 or requesting a designation of confidential commercial information pursuant to 29 C.F.R. §70.26. Claimant has failed to make a showing under either provision.

First, under 29 C.F.R. §18.15, "upon motion by a party or the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense" and under 29 C.F.R. §18.46(a) and (b), an administrative law judge may issue a protective order or such other orders as in his or her judgment may be consistent with the objectives of (1) protecting privileged communications or (2) preventing undue disclosure of classified or sensitive matter. The burden of establishing good cause for a protective order rests with the movant. *See, e.g., Pearson v. Miller*, 211 F. 3d at 72. Such an order is only appropriate, however, where the party seeking the order shows good cause by demonstrating a particular need for protection "with specificity." *Id.* In *U.S. Dept. of Labor v. HCA Medical Center Hospital*, ARB No. 97-131, ALJ No. 1994-ARN-0001 (June 30, 1999), the Administrative Review Board (the "Board") found that the hospital's nonspecific claim of "unwarranted and unnecessary intrusion" fell well short of the requisite demonstration (to show "that disclosure of the requested information will cause a clearly defined and serious injury") and the Board determined that the administrative law judge abused his discretion in protecting the hospital from further investigation or discovery. The moving party must make a particular request and a specific demonstration of facts in support of the request as opposed to conclusory

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<sup>1</sup> If the withdrawal were based upon a settlement, the settlement agreement would have to be submitted for approval.

or speculative statements about the need for a protective order and the harm which would be suffered without one. *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 412 (M.D.N.C. 1991).

The fact that the request is unopposed is not dispositive as the public's need for disclosure may also be involved. As the whistleblower provision in the Sarbanes-Oxley Act is involved, there is a public interest in the protection of investors, employees, and members of the public by improving the accuracy and reliability of financial disclosures by publicly traded corporations. *See generally* S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002).<sup>2</sup>

Here, the Complainant has submitted no facts to support a need for confidentiality. Specifically, Complainant has not identified a privacy interest or potential harm or embarrassment that could result from disclosure of the record in this case, and Complainant has not referenced any privileged, sensitive, or classified information that is contained in the record. Thus, there has been no articulated basis for the record to be sealed under a protective order.

Second, a party may also designate specific information as confidential commercial information pursuant to 29 C.F.R. §70.26. *See also* 29 C.F.R. §18.15(a)(6). The request for such designation must be in writing and, if possible, supported by a statement by an officer or authorized representative. 29 C.F.R. §70.26(b). After such showing is made, it must be ensured that the confidentiality of the records does not run afoul of the requirements of law. *See generally Connecticut Light & Power Co. v. Secretary of the U.S. Dept. of Labor*, 85 F.3d 89 (2d Cir. 1996); *Bragg v. Houston Lighting & Power Co.*, 1994-ERA-38 (Sec'y June 19, 1995). In this case, the Complainant provided no rationale for the record being designated as containing confidential commercial information, and Complainant's request fails under 29 C.F.R. §70.26.

Moreover, while a party may request predisclosure notification under 29 C.F.R. §70.26, even confidential information may be subject to disclosure. In this regard, the records in whistleblower cases are agency records and must be made available for public inspection and copying under the Freedom of Information Act (FOIA), 5 U.S.C. §552. Even if the record were sealed, the Department of Labor would be required to respond to any request to inspect and copy the record of this case pursuant to FOIA. As the Board has noted: "If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed." *Seater v. Southern California Edison Co.*, 1995-ERA-13 (ARB March 27, 1997). In such case, the parties would be entitled to predisclosure notification rights under 29 C.F.R. §70.26.

## **Conclusion**

In summary, the Complainant's Motion to withdraw her objections and the request for a hearing is granted, but the request for the record to be sealed is denied. This Order may be amended at any time, by application of the parties or sua sponte, according to the discretion of

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<sup>2</sup> The Act was designed to prevent corporate deceit, to protect investors, and to restore full confidence in the capital markets. S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002). "Accountability and transparency help our markets work as they should, in ways that benefit investors, employees, consumers, and our national economy." *Id.*

the undersigned administrative law judge upon a showing of good cause for treating the record as confidential.

### **ORDER**

**IT IS HEREBY ORDERED**, that Complainant's motion to withdraw her objections and hearing request relating to her whistleblower retaliation case against Respondent Pulte Homes, Inc. be, and hereby is, **GRANTED**, and this case be, and hereby is, **DISMISSED WITH PREJUDICE**, and

**IT IS FURTHER ORDERED** that the Complainant's request for the record to be sealed be, and hereby is **DENIED**.

**A**

PAMELA LAKES WOOD  
Administrative Law Judge

Washington, D.C.

**NOTICE OF APPEAL RIGHTS:** To appeal you must file a petition for review (Petition) within ten business days of the date of the administrative law judge's decision with the Administrative Review Board ("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. Your Petition must specifically identify the findings, conclusions or orders you object to. You waive any objections you do not raise specifically.

At the time you file the Petition with the Board you must serve it on all parties, and the Chief Administrative Law Judge; 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.

If you do not file a timely Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110. Even if you do file a Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days after you file your Petition 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).