U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 05 January 2006

CASE NO.: 2006-SOX-16

In the Matter of:

SANDRA D. BRADY,
Complainant,

v.

DIRECT MAIL MANAGEMENT, INC.,
Respondent,

Appearances: Rex L. Fuller, III, Esquire
For the Complainant

Jay P. Holland, Esquire
For the Respondent

Before: STEPHEN L. PURCELL
Administrative Law Judge

RECOMMENDED ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes Oxley Act of 2002, 18 U.S.C. § 1514A (herein "Sarbanes-Oxley" or "the Act"). The Act prohibits discriminatory actions by publicly traded companies against their employees who provided information to their employer, a federal agency or Congress that the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud) or 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.

Procedural History

On September 20, 2005, Sandra D. Brady (herein "Complainant" or "Ms. Brady") filed a formal complaint with the Department of Labor, Occupational Safety & Health Administration ("OSHA") against Direct Mail Management, Inc. (herein "Respondent" or "DMM") under the Act.

On October 4, 2005, after conducting an investigation, OSHA found that the complaint was untimely inasmuch as Complainant filed her complaint more than 90 days after the adverse employment action alleged therein.

On October 31, 2005, Complainant filed a timely appeal of OSHA's determination with the Office of Administrative Law Judges.

On December 13, 2005, Respondent filed a motion for summary decision in which it alleged that Complainant's suit was time-barred. Respondent's Motion for Summary Decision ("Resp. Mot.") at 1. Respondent further alleged that it is not covered under the Act, inasmuch as Sarbanes-Oxley applies only to publicly-traded companies, or officers, employees, contractors, subcontractors, or agents of such companies. *Id.* at 5-6.

On December 27, 2005, Complainant's counsel filed an opposition to Respondent's motion for summary decision. Complainant's Answer to Respondent's Motion for Summary Decision ("Comp. Ans.").

On December 29, 2005, Respondent filed a reply to Complainant's opposition to DMM's motion for summary judgment. ("Resp. Reply").

On January 4, 2006, Complainant's counsel filed an objection to Respondent's reply.

Undisputed Material Facts

The undisputed material facts listed below are derived from the complaint dated September 15, 2005 filed by Complainant with OSHA in this matter, Ms. Brady's Objections to Secretary's Findings in Direct Mail Management/Brady/3-0050-05-021 dated October 27, 2005, Respondent's Motion for Summary Decision filed with the Office of Administrative Law Judges on December 13, 2005, and Complainant's Answer to Respondent's Motion for Summary Decision filed with this office on December 27, 2005.

1. Complainant was previously employed as a bookkeeper by DMM for nearly twenty-three years.

2. DMM performs direct mail services on a contract basis for publicly traded companies but is not, itself, a publicly traded company.

3. On or about January 7, 2005, Complainant informed DMM officers that she intended to file "a grievance" with "the Department of Labor" concerning DMM's alleged practice of wrongfully keeping overpayments of customers' funds.

4. Complainant's employment with DMM was terminated on January 24, 2005.

5. On or about February 22, 2005, Complainant retained counsel to represent her regarding what she believed was the wrongful termination of her employment by

DMM.

6. On August 20, 2005, Complainant retained other counsel, Rex L. Fuller III, an attorney in Chesapeake Beach, Maryland, to represent her regarding what she believed was the wrongful termination of her employment by DMM.

7. Rex L. Fuller III thereafter filed with OSHA on behalf of Complainant a complaint dated September 15, 2005 alleging, *inter alia*, that Ms. Brady was wrongfully discharged by DMM in violation of Sarbanes-Oxley in retaliation for her having refused to keep overpayments of customers' funds and informing DMM officers that she intended to report DMM's conduct to the Department of Labor.

8. The complaint filed by Rex L. Fuller III was received by OSHA on September 20, 2005, 239 days after Ms. Brady was discharged from her employment by DMM.

9. On September 28, 2005, Richard D. Soltan, Regional Administrator of OSHA in Philadelphia, Pennsylvania, issued certain findings with respect to Ms. Brady's complaint including, *inter alia*, that the complaint was untimely and was therefore dismissed.

10. On October 31, 2005, Rex L. Fuller III filed with the Office of Administrative Law Judges on behalf of Complainant a request for hearing dated October 27, 2005 in which he listed various objections to OSHA's findings.

Discussion

Respondent is seeking summary decision of this matter based on Ms. Brady's failure to file her complaint with OSHA within 90 days from the date upon which she alleges she was subjected to retaliation by Respondent for protected activity. In the alternative, Respondent seeks summary decision because it is not a "covered entity" under the Act.

Summary decision may be granted to either party if the pleadings, affidavits, or material obtained through discovery, show that there is no genuine issue of material fact that remains to be resolved. 29 C.F.R. §§ 18.40-41. The moving party bears the initial burden of demonstrating that there is no disputed issue of material fact, which may be demonstrated by "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Hall v. Newport News Shipbuilding and Dry Dock Co.*, 24 BRBS 1, 4 (1990). Upon such a showing, the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322; *Hall*, 24 BRBS at 4. All evidence must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 261 (1986); *Hall*, 24 BRBS at 4. Where a genuine issue of material fact does exist, an evidentiary hearing must be held. 29 C.F.R. §18.41(b).

Under the Act, an employee alleging discharge or other discrimination must file a complaint with the Secretary of Labor within 90 days of the violation. 18 U.S.C.

§ 1514A(b)(2)(D) ("An action … shall be commenced not later than 90 days after the date on which the violation occurs."); *see also* 29 C.F.R. § 1980.103(d) ("Within 90 days after an alleged violation of the Act occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.")

In this case, the statute of limitations began to run when Complainant was fired on January 24, 2005, as that is the date of the alleged adverse action. *See, e.g., Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 97-ERA-53, slip op. at 36 (ARB Apr. 30, 2001) (date employer communicates to employee its intent to implement adverse employment decision marks occurrence of violation rather than date employee experiences consequences of decision). It is undisputed that Complainant thereafter filed a complaint with OSHA on September 20, 2005, 239 days after the alleged violation. Complainant's Request for Hearing; Comp. Ans. at 3. Therefore, her complaint, by statute, is untimely. 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d).

Equitable Estoppel and Equitable Tolling

Despite the fact that her complaint was untimely under § 1514A(b)(2)(D), Complainant's attorney argues that she is entitled to pursue her claim based on application of the doctrines of equitable estoppel and equitable tolling. Complainant's counsel argues, *inter alia*:

> Ms. Brady was fired for refusing to violate the law and for stating she would complain to "the Department of Labor." Such a complaint should not be invalidated by inaction of Ms. Brady's former counsel, precisely because she informed the Respondent that the was going to complain to "the Department of Labor." Under this particular set of facts, allowing the Respondent to hide behind the inaction of Ms. Brady's former counsel obliterates the very essence of the protection established by the Sarbanes-Oxley Act.
>
> Courts have long invoked waiver, estoppel, and equitable tolling to ameliorate the inequities that can arise from strict application of a statute of limitations. This is such a case. Ms. Brady's brave declaration of intent to seek Department of Labor investigation and correction of Respondent's activities warrants special equitable consideration. Similarly, Respondent's harsh reaction, firing her, warrants special attention. The fundamental purpose of the Sarbanes-Oxley Act is opening internal corporate fraud to professional investigation and correction by protecting those inside who bring it to light. Her specific claim of the statute's protection should override her former counsel's lack of prompt filing. Absent equitable tolling in favor [of] Ms. Brady's specific claim of the statute's protection, its fundamental purpose will be lost. The Department of Labor should, therefore, retain the option to proceed with this case by equitably tolling the limitations period.

Comp. Ans. at 3-4 (citations omitted). As a result, she requests that Respondent's Motion for Summary Decision be denied. *Id.* at 5.

Equitable estoppel focuses on actions taken by a respondent that prevent a complainant from filing a claim. *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000). Equitable tolling, in contrast, focuses on the complainant's inability, despite all due diligence, to obtain vital information bearing on the existence of his complaint. *Santa Maria*, 202 F.3d at 1178. Thus, equitable tolling extends the statute of limitations until the complainant can gather information needed to articulate a claim.

To the extent Ms. Brady relies on the doctrine of equitable estoppel as a basis for denying summary judgment, Complainant does not allege that Respondent affirmatively prevented her from filing a complaint. Complainant simply alleges that she "was fired [on January 24, 2005] for refusing to violate the law and for stating she would complain to 'the Department of Labor.'" Comp. Ans. at 3.

Even assuming that Complainant's assertions are true, Complainant has not shown that Respondent should be equitably estopped from seeking dismissal of the complaint she filed in September 2005. A finding of equitable estoppel may be supported by various considerations including: "(1) the plaintiff's actual and reasonable reliance on the defendant's conduct or representations, (2) evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct, and (3) the extent to which the purposes of the limitations period have been satisfied." *Santa Maria v. Pacific Bell*, *supra.*, 202 F.3d at 1176.

Accepting as true Complainant's recitation of the facts in this case, there is simply no conduct by DMM upon which Ms. Brady could have relied for not filing a complaint within 90 days from January 24, 2005, the date she was fired. Complainant does not allege, nor do the undisputed facts establish, that Respondent said or did anything deceptive or improper that might have reasonably led her to believe she could not, or should not, initiate a lawsuit challenging DMM's decision to fire her. Indeed, Complainant first retained counsel on or about February 22, 2005, well within 90 days of the alleged adverse action against her, to assist her with respect to her termination from DMM. Complaint at 2. Even before she was fired and retained counsel, Complainant, as she admits in her complaint, "was aware of [the Act] and relied on its protection" when confronting DMM officers about alleged wrongdoing on January 7, 2005. *Id.* at 1. It is thus clear that Complainant was fully aware of her rights under Sarbanes-Oxley, both before and after she was fired, and the doctrine of equitable estoppel simply does not apply given the facts presented.

As noted above, Complainant also relies on the doctrine of equitable tolling as a basis upon which to deny summary judgment. The only legal authority cited by Ms. Brady in support of its application is *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990). Comp. Ans. at 3-4.

Generally, there are three situations in which tolling the statute of limitations is proper: (1) when the defendant has actively misled the plaintiff respecting the cause of action, (2) the plaintiff has in some extraordinary way been prevented from asserting her rights, or (3) the

plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School District of the City of Allentown*, 657 F.2d 16, 20 (3rd Cir. 1981), *citing Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978). However, courts have held that the restrictions on equitable tolling must be scrupulously observed. Equitable tolling is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim. *Doyle v. Alabama Power Co.*, 1987-ERA-43 (Sec'y, Sept. 29, 1989).

With respect to the first possible basis for tolling the statute, as noted above, Complainant has not alleged, nor do the undisputed facts establish, that Respondent misled her in any way regarding her cause of action under the Act. Indeed, there is no evidence that DMM personnel did or said anything to dissuade Complainant from initiating legal action of any kind regarding what she viewed as an unlawful firing.

Similarly, with regard to the second ground which might support application of the doctrine, Complainant has failed to point to any extraordinary circumstances that may have prevented her from timely asserting her rights under the Act. She states first that "the passage of time from her initial contact with other counsel until now should not be assessed against her ability to file under the Act, in that at all times, she relied on counsel to pursue her claims." Complaint at 2. Ms. Brady further argues that the "statute's protection should override her former counsel's lack of prompt filing." Comp. Ans. at 4. However, Complainant's reliance on retained counsel to adhere to the filing requirements of the Act is not an "extraordinary circumstance" which might justify application of the doctrine of equitable tolling.

In *Irwin v. Department of Veterans Affairs*, the only case cited by Complainant as a basis for invoking equitable tolling, the Court wrote, *inter alia*:

> Under our system of representative litigation, "each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney."

Irwin, 498 U.S. at 92, *citing Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962). Other courts have similarly acknowledged that a party's reliance on counsel as a basis for avoiding a statute of limitation is not sufficient to afford the protection of equitable tolling. For example, as one court wrote: "Equitable tolling is not appropriate where the failure to timely file was allegedly caused by the plaintiff's reliance on the advice of counsel. *Dimetry v. Department of U.S. Army*, 637 F. Supp. 269, 271 (E.D.N.C. 1985) *citing Genovese v. Shell Oil Co.*, 488 F.2d 84 (5th Cir. 1973). *See also*, *Woods v. Denver Department of Revenue*, 818 F. Supp. 316, 318 (D. Colo. 1993) (reliance on advice of counsel, even bad advice, not grounds for invoking doctrine of equitable tolling). Complainant's reliance on her prior attorney's conduct thus does not justify her failure to file a complaint within the applicable 90-day period.

Finally, regarding the third situation under which the doctrine of equitable tolling might apply, there is no evidence that Complainant ever contacted, or filed a formal complaint with, any agency alleging discrimination by Respondent prior to September 20, 2005 when her complaint was filed with OSHA. Since no other complaint was ever filed, Complainant cannot

now argue that she met the statute of limitations, but inadvertently initiated her lawsuit in the wrong forum. The doctrine of equitable tolling thus has no application in this case.

Waiver

Complainant has also alleged, as an additional basis for denying summary judgment, that Respondent has waived its right to contest any of Complainant's allegations because it did not respond to her initial complaint, filed September 20, 2005, or her subsequent Objections to the Secretary's Findings and Request for Hearing, filed October 31, 2005. Comp. Ans. at 1, 2. According to Ms. Brady:

> Respondent failed to file any answer in this case at all. The Respondent never answered the initial complaint (to which it refers in its motion as "the Complaint" . . . , which was dated and mailed to the Respondent on September 12, 2005 [sic – September 15, 2005]. Nor did it respond to the Objections to the Secretary's Findings and Request for Hearing dated and mailed to the Respondent on October 27, 2005.

Comp. Ans. at 1-2. (citations omitted). Relying on 29 C.F.R. § 18.5,[1] Complainant further states:

> Under the most generous construction of the Rules, the Respondent defaulted by failing to answer at least by the expiration of 30 days from the date of the Objections, October 27, 2005, plus five days, or December 5, 2005.
>
> The relevant provision . . . is mandatory: failure to file an answer "shall" be deemed a waiver of the right to appear and contest the allegations. The sole purpose of Respondent's motion is to appear and contest the allegations by asserting they were not timely and that Respondent is not subject to them. The Respondent must, therefore, be deemed as a matter of law to have waived that right. The motion for summary decision should, therefore, be denied.

Id. at 2.

Complainant's reliance on § 18.5 is misplaced. Although Part 18 of 29 C.F.R. contains the *general* rules of practice and procedure for adjudicatory proceedings before the Office of Administrative Law Judges, whenever those rules are inconsistent with any rule of special application, the latter controls.[2] Discrimination complaints under the Sarbanes-Oxley Act are

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1 Complainant's counsel incorrectly cites Title 28 of the Code of Federal Regulations in his opposition to Respondent's motion for summary judgment. The text of the rule quoted by counsel, however, is from 29 C.F.R. § 18.5.

2 Section 18.1(a) states in relevant part:

> These rules of practice are generally applicable to adjudicatory proceedings before the Office of Administrative Law Judges, United States Department of Labor. Such proceedings shall be conducted expeditiously and the parties shall make every effort at each stage of a proceeding to avoid delay. *To the extent that these rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling*. (Italics added).

expressly governed by the rules set forth in 29 C.F.R. Part 1980. There is no requirement under 29 C.F.R. Part 1980 that a respondent file an answer or otherwise respond to either an initial complaint filed with OSHA or to a request for a hearing filed by a complainant with the Office of Administrative Law Judges after a complaint has been denied or dismissed. Inasmuch as Respondent was not required to respond to either of Claimant's filings, Respondent did not waive its right to contest Complainant's allegations or, as it has done here, to seek summary judgment.

Applicability of the Sarbanes-Oxley Act to Respondent

Even if Complainant had timely filed her complaint in this case, which she did not, summary judgment for Respondent would still be appropriate. Complainant asserts that Respondent is "covered under the Act because it performs direct mail services as a first tier contractor to publicly traded companies." Complaint at 1. However, Respondent is not a publicly-traded company, nor is it in any other way subject to the provisions of Sarbanes-Oxley.

Under the Act, companies with a class of securities registered under 15 U.S.C. § 78l, or required to file reports under 15 U.S.C. § 78o(d), "or any officer, employee, contractor, subcontractor, or agent of such company" are covered under the Act. 18 U.S.C. § 1514A. In *Brady v. Calyon Securities*, No. 05 Civ. 3470, 2005 WL 3005808, slip op. at *8 n. 6 (S.D.N.Y. Nov. 08, 2005), the court explained that "a non-publicly traded company can be deemed to be the agent of a publicly traded company *if the publicly traded company directs and controls the employment decisions*." (Italics added). The *Brady* court went on to explain the purpose behind section 1514A(a) as follows:

> Section 806's reference to "any officer, employee, contractor, subcontractor, or agent of such company . . . simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer." The Act makes plain that neither publicly traded companies, nor anyone acting *on their behalf*, may retaliate against qualifying whistleblower employees. Nothing in the Act suggests that it is intended to provide general whistleblower protection to the employees of any employer whose business involves acting in the interests of public companies. On plaintiff's theory, the Sarbanes-Oxley Act, by its use of the word "agent," adopted a general whistleblower protection provision governing the employment relationships of any privately-held employer, such as a local realtor or law firm, that has ever had occasion, in the normal course of its business, to act as an agent of a publicly traded company, even as to employees who had no relation whatsoever to the publicly traded company.

Id. at *8. (Italics added; internal citations omitted). In a case before this office raising a similar issue, one administrative law judge wrote:

> The Complainant argues that [Affiliated Physician's Group], as a contractor or subcontractor of various publicly traded companies, should be considered a covered employee based upon the inclusion in Section 806 of the language referring to "any officer, employee, contractor, subcontractor, or agent

> of such company." 18 U.S.C. 1514A(a). However, this language simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer. It does not bridge the gap in this case which is created by the fact that the Complainant is not an employee of a publicly traded company. That is, while it is at least theoretically possible that a privately held entity such as APG could engage in discrimination prohibited by Section 806 when acting in the capacity as an agent of a publicly traded company in regard to an employee of that company, there is nothing in the language of Sarbanes-Oxley or its legislative history that suggests that Congress intended to bring the employees of non-public contractors, subcontractors and agents under the protective aegis of Section 806.

Minkina v. Affiliated Physician's Group, USDOL/OALJ Reporter (HTML), ALJ No. 2005-SOX-19 at 6 (ALJ February 22, 2005).

Complainant has not alleged, nor do the undisputed facts establish, that any of the companies with which DMM did business directed or controlled DMM's employment decisions, including the decision to terminate Complainant's employment. Furthermore, there is simply no evidence, nor does Ms. Brady suggest, that DMM acted on behalf of a publicly traded company when it elected to terminate her employment. Therefore, even if I were to find that Complainant, had timely filed a complaint in this case by virtue of either the doctrine of equitable estoppel or the doctrine of equitable tolling, Respondent would still be entitled to summary judgment inasmuch as its conduct is not subject to the provisions of Sarbanes-Oxley.

RECOMMENDED ORDER

For all the foregoing reasons, IT IS HEREBY RECOMMENDED that the motion for summary judgment of Respondent Direct Mail Management, Inc. be GRANTED.

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STEPHEN L. PURCELL
Administrative Law Judge

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.), US 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 shall 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 by 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), as found OSHA, 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; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).