U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 November 2006

CASE NO.: 2006-SOX-00065

In the Matter of

MARK CORBETT,
Complainant,

v.

ENERGY EAST CORPORATION; et al.,
Respondents.

ORDER DISMISSING COMPLAINANT'S COMPLAINT AS UNTIMELY

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, 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 et seq. ("the Sarbanes-Oxley Act" or "the Act") enacted on July 30, 2002. The Sarbanes-Oxley Act provides the right to bring a "civil action to protect against retaliation in fraud cases" under section 806 to employees who "provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employer reasonably believes constitutes a violation of [certain provisions of the Sarbanes-Oxley Act], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders…" 18 U.S.C. §1514A(a)(1). The Sarbanes-Oxley Act extends such protection to employees of companies "with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §781)["SEA of 1934"] or that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §780(d))." 18 U.S.C. §1514A(a).

I. PROCEDURAL HISTORY

By letter filed July 13, 2005 with the Department of Labor, Occupational Safety and Health Administration ("OSHA"), Mark Corbett ("Complainant") filed a charge of retaliation against his employer, Energy East Corporation and its subsidiaries, Rochester Gas and Electric and New York State Electric and Gas (collectively referred to hereinafter as "Respondents") under the Whistleblower provisions of the Sarbanes Oxley Act ("SOX").[1] Complainant alleged that he was discharged from employment with the Respondents in reprisal for raising protected complaints on March 3, 2005.

[1] Denoted as "Complaint at -."

On May 11, 2006, Respondents moved for Summary Decision pursuant to 29 C.F.R. §18.40(d). Shortly thereafter, the parties requested the assignment of a settlement judge to assist them in resolving their dispute. By Order issued September 20, 2006, Settlement Judge Michael P. Lesniak advised that the parties were unable to resolve their differences, and the case was reassigned to me. In correspondence filed September 26, 2006, Respondents asked that their motion for summary decision be addressed.

By Order issued October 5, 2006, I denied Respondents' Motion for Summary Decision on the merits. However, I directed the parties to show cause why the Complaint should not be dismissed as untimely filed pursuant to the ninety (90) day statute of limitations period provided for at 18 U.S.C. §1514A(b)(2)(D). On October 18, 2006, Respondents filed a response[2] to my Order which contained five exhibits[3] attached thereto. Complainant filed his response[4], containing eleven (11) exhibits[5], on October 19, 2006.

I find that the record is adequately developed to issue a Decision and Order on the procedural/jurisdictional aspects of the matter. I have confined my discussion to facts and law pertinent to the limited inquiry of whether Complainant's complaint with OSHA was timely filed.

II. ISSUE

Did Complainant timely file a complaint under the Act within the provisions of 18 U.S.C. §1514A(b)(2)(D) of the Act and 29 C.F.R. §1920.103 of the federal regulations?

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Statute of Limitations

The Sarbanes-Oxley Act established a statute of limitations for filing a complaint relating to employment discrimination taken against individuals who participate in activity protected under the Act. 18 U.S.C §1514A(b)(2)(D). Non-compliance with the time limitation bars the adjudication of a complaint under the Act. Specifically, the Act provides:

> **Statute of Limitations.** An action under paragraph (1) [i.e., filing a complaint alleging discrimination] shall be commenced not later than 90 days after the date on which the violation occurs.

The regulations at 29 C.F.R. §1920.103 state:

> **Filing of discrimination complaint.**

[2] Denoted as "RB at -."
[3] Denoted as "RX-1" and "RX-1A" through "RX-1D."
[4] Denoted as "CB at -."
[5] Denoted as "CX-1" through "CX-11."

> (d) Time for filing. 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…a complaint alleging discrimination…

The Department of Labor's commentary on the regulations states:

> [T]he alleged violation is considered to be when the discriminatory decision has been both made and communicated to the complainant. (Citing Delaware State College v. Ricks, 449 U.S. 250, 258 (1980)). In other words, the limitations period [i.e., the 90 days] commences once the employee is aware or reasonably should be aware of the employer's decision. Equal Employment Opportunity Commission v. United Parcel Service, 249 F.3d 557, 561-62 (6th Cir. 2001).

69 Fed Reg. No. 163, p. 52106 (August 24, 2004).

B. Factual Background

By correspondence dated November 29, 2004, Complainant was informed by his supervisor, James Laurito[6], that Mr. Laurito had not been satisfied for some time with Complainant's job performance as Director of Human Resources. See, Attachment "A" to Laurito Affidavit, filed in conjunction with Respondents' Motion for Summary Decision. At that time, Complainant was placed on a five point performance plan and was advised that if significant and sustained progress was not achieved, he would be relieved of his responsibilities at that position. Id. By letter dated March 3, 2005, Mr. Laurito notified Complainant that he was disappointed with the progress Complainant had made in addressing the concerns and expectations outlined in the earlier correspondence. See CX-10. He requested that Complainant schedule a meeting with him for March 8, 2005. Id. Due to weather conditions on that date, a teleconference took place between Mr. Laurito and Complainant, rather than a meeting in person. See Laurito Affidavit at 4. During the teleconference, Complainant advised Mr. Laurito that he would not work on the performance issues raised in the November 29, 2004 letter. Id. at 5. Furthermore, Complainant proposed a severance package in consideration of his resignation. Id. at 4.

In a letter dated March 21, 2005, James Laurito confirmed the content of the teleconference of March 8, 2005 with Complainant, and offered him two options relating to his employment with Respondents. See CX-1; RX-1A. In the letter, Mr. Laurito first expressed his disappointment with Complainant's rejection of the proposal for improvement of his performance. Mr. Laurito then offered two options regarding Complainant's employment, as follows:

> 1) If you wish to reconsider your position and work with me on improving your performance you need to meet with me in person in Rochester on Monday, March 28, 2005, so that we can get the process

[6] Mr. Laurito is President and Chief Executive Officer of NYSEG and RG&E. As President, he supervised Complainant. See Laurito Affidavit at 1.

back on track…If you intend to continue as Director of Human Resources I will expect the following:

a) A draft written performance improvement plan we can review at our meeting on March 28th;

b) A specific commitment from you to improving the five (5) areas identified in my December letter to you;

c) Weekly meetings, in person, in Rochester to review your progress under the plan;

d) Immediate and sustained improvement in your job performance.

2) If you have no desire to work with me in improving your performance, as outlined above, the Company is prepared to offer you a special assignment and severance package in accordance with the enclosed document. You have twenty-one (21) days to consider this proposal.

The final paragraph of the March 21, 2005 letter reads as follows:

> In default of an assurance from you that you want to work with me on improving your performance, you will be relieved of your responsibilities as Director of Human Resources on April 1, 2005. You will have until April 15, 2005 to consider, sign and return the enclosed Separation Agreement. *If I do not have a signed Separation Agreement from you by April 15, 2005, your employment will terminate on that date.*

CX-1; RX-1A (emphasis added).

Mr. Laurito authored another letter to Complainant, dated March 31, 2005. Mr. Laurito informed Complainant that because he did not directly contact him regarding the March 21, 2005 letter, Complainant's access to all NYSEG and RG&E facilities and computer networks was being temporarily suspended pending Complainant's decision with respect to the Separation Agreement. Mr. Laurito advised that "[Respondents] will reinstate these privileges, if they become necessary, in connection with any special assignment you may be given." See CX-3; Gleason Affidavit, Exhibit A. By letter dated April 26, 2005, Laurito notified Complainant that because he had not responded to either option offered in the March 21, 2005 letter, he was terminated from employment with Respondent effective April 15, 2005. CX-4.

Complainant filed his Complaint with OSHA on July 13, 2005. CX-5. The adverse action underlying Complainant's complaint would have had to have occurred no later than 90 days before the complaint was filed. In my Order issued October 5, 2006, I asked the parties to address whether the date of the adverse action that would trigger the 90-day filing period was the

date of the letter of March 21, 2005[7], or the effective date of Complainant's employment termination.

C. Discussion

Complainant's general position is that the 90-day filing limitations period commenced on April 15, 2005, the date on which he was terminated. Respondents counter that it commenced at some earlier date.

In Delaware State College v. Ricks, supra. the Supreme Court of the United States held that the limitations period for filing a complaint of discrimination commenced at the time the action was decided and communicated to the complainant. (In Ricks, the limitations period was triggered on the date when the Complainant was told that he would not be granted tenure rather than his actual termination date. Ricks, 449 U.S. at 258). The Court observed that termination of employment at the college was a delayed, but inevitable, consequence of the denial of tenure. Id. at 257-58. The Court cited its approval of a holding by the Ninth Circuit Court of Appeals which stated that "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." Id. at 258 (citing Abramson v. University of Hawaii, 594 F.2d 202, 209 (9th Cir. 1979) (emphasis included in original).

Complainant contends that the March 21, 2005 letter does not commence the 90-day filing period because it does not constitute an adverse action. Complainant has argued that the March 21 letter informed him that only his responsibilities as Director of Human Resources would be relieved if he failed to perform the requisite actions that were conveyed to him in the letter. See CB at 2 ("The removal of Complainant from position of Director of Human Resources **was not** an 'adverse action'") (emphasis included in original). I disagree with Complainant's construction that this proposed action is not an adverse action. An employment action that produces some tangible job consequence is considered an "adverse action" within the context of the Act. Shelton v. Oak Ridge Nat'l Laboratories, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB Mar. 30, 2001); Dolan v. EMC Corp., 2004 SOX 1 (ALJ Mar. 24, 2004); Haywood v. Lucent Technologies, Inc., 323 F. 3d 524 (7th Cir. 2003). The United States Supreme Court has defined a tangible job consequence as one that creates a significant change in employment status. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

It is axiomatic that the loss of duties and responsibilities accompanying the removal of Complainant from position of Director of Human Resources creates a significant change in employment status, and therefore constitutes an adverse action. Consequently, I find that Respondent's decision to remove Complainant from this position was fully formed and communicated to Complainant by at least the day he received the letter of March 21, 2005. Therefore, any complaint with OSHA regarding Complainant's removal as Director of Human Resources would be timely if filed 90 days after that date. However, Complainant argues that his complaint is based upon his termination from Respondents' employment, and not his removal as Director of Human Relations. Therefore, I must determine when the decision to terminate his employment was made and communicated.

[7] The 90-day filing period would have actually commenced on March 22, 2005, the day Complainant received the letter in the mail. RX-1A.

In Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ No. 2002-AIR 8 (ARB Jan. 31, 2006), the Administrative Review Board ("ARB") recognized that the "continuing violation theory" had been rejected by the Supreme Court in cases alleging discrimination under Title VII. See, National R.R. Passenger Corp. v. Morgan, 536 U.S. 114-115 (2002. The ARB has consistently held that Morgan applies to the environmental whistleblower statutes, and in Brune, the ARB found no reason that those holdings should not apply to cases brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, codified at 49 U.S.C. section 42121(b) (AIR21). See Brune, supra. When the SOX Act was enacted, Congress specifically stated that the Act shall be governed by the construct of AIR21 49 U.S.C. section 42121(b). 18 U.S.C. 1514A(b)(2)(B). Consequently, I find it appropriate to conclude that Complainant's termination from employment is a discrete action upon which a complaint under the Act may be brought.

Complainant argues that correspondence sent by Respondents after the letter of March 21, 2005 demonstrates that the decision to terminate his employment was not manifest in the letter of March 21, 2005. Complainant argues that the offer of 21 days to consider the prospect of a special assignment and severance package shows that Respondents did not make their decision to terminate his employment on March 21, 2005, or at the very least, did not unambiguously communicate that decision to him. Read in its full context, the letter discusses several options that Complainant might elect in order to avoid termination, and the last sentence of the letter reads, "[i]f I do not have a signed Separation Agreement from you by April 15, 2005, *your employment will terminate on that date*." CX-1; RX-1A (emphasis added). The plain language of the letter suggests that Complainant would lose his job, and not only be divested of his duties as Director of Human Resources if he chose not to work with Mr. Laurito towards improving his performance. However, the final paragraph of the March 21, 2005 letter specifically states "[i]n default of an assurance from you that you want to work with me on improving your performance, you will be relieved of your responsibilities as Director of Human Resources on April 1, 2005". This language adds weight to Complainant's contention that the letter referred to his removal from that position, and not from his employment.

Complainant contends that he was unaware that his termination was imminent until he received the termination letter of April 26, 2005. CB at 7 ("The termination date was the date of the 'adverse action'"). Complainant explained that he was waiting to hear from Mr. Laurito about the "special assignment" proposed in the March 21 letter (CB at 8) and that his status with the company was therefore not clearly known to him until the correspondence of April 26. Mr. Laurito has stated that he received a voice mail message from Complainant on March 29, 2005 in which Complainant advised that he wanted to make a counterproposal to the Separation Agreement. Laurito Affidavit at 5. Complainant has not refuted this. I find that it was reasonable for Complainant at that time to not have considered the March 21 letter as a definitive decision to terminate his employment. In response to Complainant's voice mail, Mr. Laurito sent Complainant the letter of March 31, 2005. CX-3. In that letter, Mr. Laurito made it clear that the terms of the Separation Agreement were non-negotiable and that its terms would be revoked if not signed and received by April 15, 2005. CX-3; RX-1C. Mr. Laurito heard nothing further from Complainant after that letter. Laurito Affidavit at 5; CB at 2-3, fn. 4.

I find that upon receipt of this letter, Complainant became aware or reasonably should have become aware that his termination from Respondents' employment was imminent and definitive. He was advised that the terms of the agreement were non-negotiable and would be revoked, yet he chose not to take further action. Complainant conceded as much in his affidavit to OSHA where he wrote: "[t]he agreement demanded that I acknowledge that I had performance issues. That was not true and I refused to sign the agreement understanding that the language of the letter dictated discharge." CX-2.

Complainant's assertion that he was waiting to hear from Mr. Laurito regarding the nature of the prospective assignment is not fully supported by the record. Complainant contends that he "was contemplating taking the offer of continued employment if his new assignment was related to Labor Relations, but he never heard back from Laurito and hence was terminated." CB at 2-3, fn. 4. He also asserts that "[i]f Laurito had gotten back to [him] prior to April 15, 2005 with a labor relations assignment, there never would have been any 'adverse action.'" CB at 6. The documentary evidence establishes that Complainant was provided a description of the special assignment with the Separation Agreement. CX-3; RX-1-C. The letter of March 31, 2005, advised Complainant that his access to Respondents' facilities and computer were suspended, "pending [his] decision with respect to the Separation Agreement and the *special assignment described therein*." CX-3; RX-1C (emphasis added). A review of the second page of the Separation Agreement discloses that the position of "Human Resources Advisor" is explicitly described and set forth in Paragraph 2. I accord little weight to Complainant's argument that "[n]o reasonable person would have signed an agreement without knowing what their job was actually going to be" (CB 10), or alternatively, that "Complainant was waiting to hear back from Mr. Laurito in terms of what 'any assignment' meant" (CB at 10). The special assignment was defined in the Separation Agreement and Complainant voluntarily chose not to sign and return it.

In his affidavit to OSHA, Complainant stated that "I informed Laurito that although I was interested in the agreement, I wanted some modifications made to it. I never heard back from him." CX-2. This is contradicted by the letter of March 31, 2006, in which Mr. Laurito clearly informed Complainant that the terms of the agreement were non-negotiable and that Complainant's failure to sign and return it would lead to his termination. It should have been apparent to Complainant after receipt of the March 31 letter that further discussion with Laurito on that issue would not occur. The onus was placed squarely upon Complainant to take action and he chose not to.

Regardless of whether Complainant sincerely was waiting to hear from Mr. Laurito about a future assignment, I decline to use subsequent communications with Complainant as the triggering date of an adverse action, when the need for those communications emanated from Complainant's failure to take action prescribed in the letter of March 21, 2005. In that correspondence, Complainant was given clear indication of Employer's intent to terminate his employment when he was advised that he had "until April 15, 2005 to *consider*, *sign*, *and return* the enclosed Separation Agreement." CX-1; RX-1A (emphasis added). This deadline was reinforced in the March 31, 2005 letter, where he was told: "[*y*]*ou* also need to be aware that if I do not receive a signed Agreement *from you* by April 15, 2005, the Company's proposal will be

withdrawn as indicated in my March 21st letter." CX-3; RX-1C (emphasis added). Both communications unequivocally refer to Complainant's separation from Respondents' workforce.

Respondents refer to two opinions by the Second Circuit Court of Appeals in support of their position that the Complaint was untimely filed. In Russo v. Trifari, 837 F.2d 40 (2d Cir. 1988), a case brought under the Age Discrimination in Employment Act ("ADEA"), the Court held that the adverse action occurred on the date on which the complainant was informed that he had the option of relocating or being terminated, rather than the actual date of termination.[8] Russo, 837 F.2d at 42-43, (citing Delaware State College v. Ricks, *infra.*). More recently, the Second Circuit reiterated this holding when distinguishing discriminatory discharge cases from constructive discharge cases. The Court explained:

> In discriminatory discharge cases, then, the illegal act is often the decision to terminate the employee, and the limitations period begins to run on the date that the employer gives definite notice of that decision to the employee.[9] Thus, the time for filing a claim with the EEOC "starts running on the date when the employee receives a definite notice of the termination, not upon his discharge."[10]

Flaherty v. Metromail Corp., 235 F.3d 133, 137 (2d Cir. 2000).

This standard has been applied in the administrative adjudication of a SOX case by ALJ Robert D. Kaplan, who held:

> The fact that Complainant could have avoided termination if she found another job with Respondent does not prevent the statute of limitations from running. The statute of limitations begins to run when the employee is made aware of the employer's decision to terminate him or her even when there is a possibility that the termination could be avoided.

Lawrence v. AT&T Labs, 2004-SOX-00065 (ALJ Sept. 09, 2004) (citing English v. Whitfield, 858 F.2d 957 (4th Cir. 1988)[11]; Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976); Ricks, *infra.* at 261).

The instant matter presents circumstances similar to those in the aforestated cases. It is clear that the letter of March 21, 2005 provided options for avoiding termination that Complainant elected not to exercise. Any ambiguity inferred from the wording of that letter was cured by the letter of March 31, 2005 [12], in which Complainant was directed to either sign and

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[8] The complainant was informed of his option on November 1, 1983. If he declined to relocate, termination was effective January 1, 1984. The Court held that the action accrued on November 1, 1983. Russo, 837 F.2d at 42.
[9] Citing Ricks, *infra.*; Chardon v. Fernandez, 454 U.S. 6, 8 (1981).
[10] Citing Miller v. International Tel. & Tel. Corp., 755 F.2d 20, 23 (2d Cir. 1985).
[11] Also cited by Complainant. CB at 8.
[12] In English v. Whitfield, *infra.*, cited by Complainant, the complainant argued that because the termination of her active employment depended on whether she secured other suitable employment, a fact which would not be known until the last day of her temporary assignment (858 F.2d at 961), the statute of limitations should commence on the date of her actual termination. The court rejected this reasoning stating, "But the possibility that the effect(s) of a challenged decision might be avoided by such means, does not render the decision equivocal for the purposes here at

return the Separation Agreement, as written, or face termination. As in the circumstances underlying Russo v. Trifari, supra., Complainant was given the opportunity to choose a course of conduct or face a future effective date of termination.

Based on the foregoing, I find that Respondents made the decision to terminate Complainant's employment as of March 21, 2005. Termination was conditioned upon Complainant's inaction. Upon receipt of the letter of March 31, 2005, Complainant should have reasonably become aware that any further inaction on his part would lead to his definitive and imminent termination. His awareness of this consequence triggered the 90-day filing period as of that date. Because the March 31 letter was delivered to Complainant the next day (EX-1D), I find that the 90-day filing period commenced on April 1, 2005. Complainant filed his Complaint with OSHA on July 13, 2005. Complainant therefore filed his Complaint more than 100 days after he reasonably should have been aware of the alleged discriminatory act. Accordingly, I find that his Complaint was untimely filed under the Act.

IV. CONCLUSION

Based on the foregoing, I find that the complaint of Complainant Mark Corbett, filed on July 13, 2005 is barred because it was not timely filed within the 90-day statute of limitations period imposed by 18 U.S.C. §1514A(b)(2)(D). The statutory period began to run when on April 1, 2005, Complainant became fully aware that his failure to sign and return Respondents' Separation Agreement would definitively and imminently terminate his employment. Accordingly, dismissal of Complainants' Sarbanes-Oxley claim as untimely is appropriate.

ORDER

For the reasons stated herein, the complaint of MARK CORBETT is DISMISSED.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

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

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issue, at least where, as here, the effect can be avoided without negating the alleged discriminatory decision itself. Id. at 962.

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).