U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 May 2006

Case No.: 2006-SOX-00008

In the Matter of

KAREN K. GATTEGNO
Complainant

v.

PROSPECT ENERGY CORPORATION;
PROSPECT ADMINISTRATION, LLC;
PROSPECT CAPITAL MANAGEMENT, LLC;
JOHN F. BARRY, III; GRIER ELIASEK;
MICHAEL E. BASHAM; ROBERT A. DAVIDSON;
WALTER V. PARKER; EUGENE STARK
and DARIA BECKER
Respondents

DECISION AND ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION AND DISMISSING COMPLAINT

Pending is Respondents' motion for summary decision dismissing the complaint, grounded in the proposition that such complaint, filed on April 29, 2005, was filed outside the ninety day proscription as contained in 18 U.S.C. Sec. 1514A(b)(2)(D), see also 29 CFR 1980.103 (d).

The uncontested operative facts are as follows:

October, 2004–A former Chief Financial Officer (CFO) of Respondent[1], Mark Witt, who had been terminated by Respondent, notified Respondent in writing by counsel, that he believed certain financial improprieties had occurred at Respondent.

November, 2004–Complainant, then serving as interim CFO and as Chief Compliance Officer of Respondent, notified, by e-mail, counsel for Respondent: of her complaint as to the way in which Respondent's investigation of the foregoing Witt notification was being conducted; that she had learned that Respondent's Chief Executive Officer (CEO) had said that any new

[1] While several respondents are named, this designation is hereinafter used to refer generally to the corporate respondent, Prospect Energy Corporation.

CFO would fire her; and that since a new CFO had not been hired, she considered this statement a retaliatory action against her by the CEO.

December, 2004–Complainant is advised that a new CFO had accepted this position with Respondent, and that she has been place on a 90-day administrative leave from Respondent due to performance issues.

Respondent issues the following press release:

> Concluding a thorough screening process, the Company has identified a candidate for chief financial officer and plans to announce an appointment within the next two weeks. The Company's chief financial and compliance officer was placed on administrative leave as of December 23, 2004. The Company expects to engage an outsourced compliance consulting firm to provide compliance related services. (Comp'l Depo. Exhibit 25 @ 99.1).

January 5, 2005–Complainant actively begins a new job search (Comp'l Depo. @ 120).

January 7, 2005– Respondent issues the following press release:

> As previously disclosed by the Company in its quarterly report on Form 10-Q filed on November 12, 2004, the Company received a letter from Mark Witt, the former CFO of the Company, and subsequently an investment professional of Prospect Capital Management, alleging unspecified "improprieties." The Audit Committee directed the Company's outside counsel handling Mr. Witt's earlier termination to look into his claims and also retained the law firm of Willkie Farr & Gallagher LLP to investigate his and any other claims, including the allegations being raised by Mr. Witt and the Company's previous CCO and any other claims arising in the course of their investigation. The Audit Committee has preliminarily concluded that none of the allegations made by Mr. Witt or the Company's CCO, or the information subsequently learned in the course of this internal investigation, reflects adversely on the fairness or reliability of the financial statements of the Company. The Audit Committee has further concluded that, on a preliminary basis, in connection with those allegations investigated by Willkie Farr, there is no evidence of fraud by management or material deficiencies in connection with the Company's public disclosure practices. (Comp'l Depo. @ Exhibit 26 @ 99.1).

February 8, 2005–Complainant accepts a position with Eisner LLP (Comp'l Depo.@ 157), with which company she had been negotiating for a job since early January, 2005 (id. @

140), and which company, by letter dated sometime prior to February 8, 2005, acknowledged Complainant's acceptance of the job offer made by it to Complainant (Comp'l Depo. @ Exhibit 8).

February 9, 2005– Respondent issues the following press release:

> At the request of the Audit Committee of the Board of Directors, Willkie Farr & Gallagher, a major New York City law firm and counsel to the Independent Directors, conducted an independent investigation from mid-November to mid-December 2004, into the performance of and allegations made by Mark Witt and Karen Gattegno, the former chief financial and chief compliance officers of Prospect Energy, respectively. After an extensive investigation, which is now complete, Willkie found that the allegations of improprieties were meritless. Mr. Witt had already been terminated before the investigation, and after the investigation Ms. Gattegno was put on 90 day administrative leave. (id. @ Exhibit 9 @ 5).

February 10, 2005– Complainant is sent an e-mail from an official at Respondent (Basham) which notes that she should "- - move ahead with the next phase of [her] career" (id. @ Exhibit 27).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Complainant insists that the adverse employment action (or "- - violation of the Act- - (i.e., when the discriminatory decision has been both made and communicated to the complainant)- - " 29 C.F.R. 1980.103 (d)) , occurred at the issuance of the February 9, 2005 press release, and the February 10, 2005 sending of the Basham e-mail. Not until then, she asserts, could she reasonably know that she was finally, albeit constructively, discharged without the possibility of a return to active employment with Respondent; and that, not until then, was her reputation, and future job prospects irrevocably damaged. Thus, she considers her complaint timely filed on April 29, 2005, within ninety (90) days of these actions.[2]

Respondent argues that whatever adverse employment actions occurred, if they occurred at all, occurred, at the latest, on January 7, 2005, more that 90 days before the complaint filing.

"When a motion for summary judgment is made and supported . . . a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). An administrative law judge may enter summary judgment "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that

[2] It is noted that, any adverse employment action occurring on or after January 28, 2005, 90 days prior to the April 29, 2005 filing date, would be actionable and timely included in the complaint.

there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d).

The evidence, however, must be viewed in the light most favorable to the non-moving party, and all reasonable inferences must be drawn in favor of that party.

In this case, I am compelled to find that summary decision in favor of Respondents is appropriate.

DAMAGE TO REPUTATION AND FUTURE JOB PROSPECTS

As noted, Complainant bases her claim upon two alleged discrete adverse employment actions.[3] First, she reads the February 9, 2005 press release (supra.) as, for the first time, damaging her reputation and prospects for future jobs. At oral argument of the subject motion, she was given the opportunity to submit a specific offer of proof in respect of overcoming the notion, viewed by the writer as very nearly compelling, that the January 7, 2005 press release (supra.) is indistinguishable from the February 9 release, vis a vis adverse action. Complainant had taken the position that the use of her name and the term "performance" in the latter release distinguishes it from the earlier release (Tr. @ 37-61). What was clearly expected of Complainant was some sort of proffer that because of the additional wording in the February 9 press release, and not because of the January 7 press release alone, her job prospects and reputation were damaged.[4] For example, testimony that her resume would have been forwarded for consideration by a prospective employer after the January press release, but not after the February press release (Tr. @ 53, ln. 12-15; @ 58, ln. 14-17). This, Complainant failed to produce and, thus, she cannot survive the subject motion in this regard. The (Franchino) affidavit submitted by her speaks only to the impact of the February press release, and not to the variable impacts of the two press releases, i.e., that the January release was not harmful to her job prospects, whereas the February release was. Accordingly, I am compelled to find the two press releases indistinguishable insofar as having an adverse impact upon Complainant's reputation and future job prospects. The January release, without more as invited from Complainant, must be found to be as damaging as the February release. And, since that press release was issued more than 90 days prior to the complaint filing, it is not actionable as an adverse employment action here.

Moreover, Complainant's argument that the February release is merely a continuation of the January release (continuing violation theory), implicitly raised in her brief (@ 21) as well as at oral argument (Tr. @ 40), is unavailing, see – Brune v.Horizon Air, ARB Case No.04-037, 1/31/06-incorporating the holding in National R.R. Passenger Corp. v. Morgan, 536

[3] Complainant agrees that the act of placing her on administrative leave is not pursued herein as an adverse employment action, as obviously having occurred outside the statute of limitations. (Br. Opp. @ 6, 20).

[4] At oral argument, Respondent counsel suggested that the proffer take only the form of testimony of the individual(s) who Complainant previously alleged actually turned her down for a job due to the 2/9 press release (Tr. @ 42, ln. 22-25; @ 43, ln. 1-4; @50, ln. 17-25; @51, ln. 4-21; @55, ln. 7-12; @58, ln. 23-25; @59, ln.1-6).

U.S.101(2002) that such a theory is not available where, as here, discrete acts of alleged discrimination are involved.[5]

CONSTRUCTIVE DISCHARGE

As noted above, Complainant accepted a new job prior to the February press release (supra.). But, she argues that she was constructively discharged upon the issuance of that press release. To accept a new job is behavior suggestive of having already been discharged, or having constructively resigned from a prior job without having been discharged at all![6] Prior to the February press release issuance, Complainant acted as if she had already been discharged or had already resigned. Thus, her argument that she was constructively discharged as of February 9, fails.

As important, under the facts of this case, I find that no reasonable person would have sensed the existence of working conditions so intolerable as to compel a resignation, only after January 28, 2005.[7] Complainant's employment situation and behavior prior to this date belies such a conclusion. First, Complainant is told by the CEO as early as November 16, 2004, that when a new CFO is hired, she would be fired.[8] On December 21, 2004, a new CFO is hired (Comp'l depo. @ 360). Two days later, she is told that she was being placed on administrative leave due to performance issues. The following week, the company published to the world by press release, this action putting her on leave, and that it is engaging an outsourced compliance consulting firm to provide compliance related services. At the beginning of the new year, Complainant began to actively seek a new job (id. @ 120). With this background in mind, her working conditions, as well as her behavior, in place and occurring nearly a month prior to the date Complainant insists she first was compelled to resign, to say the least, are clearly such as would both alert a reasonable person that her career with her employer is at an end, and suggest that she is acting consistent with such awareness. That only the February 9, appearance of a press release, relating essentially the same information as the press release issued about one month earlier, then first compelled Complainant to resign[9] is simply not a rational conclusion which may be drawn. I find that Complainant has failed to respond to the subject motion by setting forth specific facts showing that there is a genuine issue of fact in this regard.

[5] The rules and procedures set forth in section 42121(b)(1), govern in a proceeding as brought here ,18 U.S.C. 1514(A)(b)(2)(A).

[6] Noted also in this regard, is Complainant's testimony that she does not recall whether the Balstrom e-mail, supra., came prior to her acceptance of the new job (Comp'l depo.@ 186).

[7] See ftn. 2 supra.

[8] And, as already noted, she considered this action retaliatory.

[9] There is no suggestion, nor evidence to the effect, that any significant activity bearing on the issues involved here, occurred between January 28, 2005 and February 9, 2005, see ftn.2, supra.

ORDER

Based upon the foregoing, I find that no genuine issue of material fact is presented on the issue whether any adverse employment was taken against Complainant within ninety (90) days of the filing of her complaint.

The complaint is, accordingly, DISMISSED.

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RALPH A. ROMANO
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 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).