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: 18 October 2006*In the Matter of*:

HUNTER R LEVI
Complainant

v. **2006 SOX 00108**

ANNHEISER BUSCH.
Respondent

RECOMMENDED DECISION AND ORDER

This is the second claim filed by the same complainant, Mr. Levi, against the same respondent, Annheiser Busch Companies ("ABI") within the past year under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX or the Act). In ***Hunter R. Levi v. Anheuser-Busch Companies, Inc.***, 2006-SOX-37, Judge Richard Stansel Gamm concluded that Mr. Levi's "correspondence to the SEC, with copies to the EEOC and NLRB, and his letters to Representative Gephardt did not contain allegations that involved the six type[s] of SOX prohibited corporate conduct. Therefore, the correspondence did not represent timely SOX whistleblower complaints filed in the wrong forum."[1] Judge Stansel Gamm reconsidered his opinion and came to the same conclusion.[2] In this determination Judge Stansel Gamm determined that he specifically did not address allegations of lying and perjury in making his Initial Decision and Order.

That determination was appealed by Complainant to the Administrative Review Board ("Board" or "ARB") on or about July 4, 2006 at ARB Case No. 06-102.[3]

In this case, Mr. Levi alleges that certain statements Respondent made in its Motion to Dismiss in 2006 SOX 37, the first case, were false and as a result, "ABI's false statements were retaliation attempts designed to derail my SOX complaint, which would result in ABI avoiding rehiring me, continued [to]damage my prospects for comparable employment outside of ABI (blacklisting) and stop any investigations into ABI actions chronicled in 2006SOX37."

A Respondent's Motion to Consolidate this case with the appeal was denied as this Office does not have jurisdiction once a case is appealed.

On August 25, the Respondents filed a Motion to Dismiss with the Motion to

---

[1] The decision states: Facially, because Mr. Levi did not submit his November 19, 2004 complaint within 90 days of his February 14, 2003 indefinite suspension with intent to discharge, that complaint is untimely. Factually, since the referenced incidents in his correspondence and attachments to the Secretary and OSHA did not relate to the six specific SOX violations, his submissions on March 3, 2003 and in April 2003 were not SOX complaints. For the similar reasons, Mr. Levi's letters to the SEC, EEOC, NLRB, and Representative Gephardt within the same time frame were not SOX whistleblower complaints. Finally, Mr. Levi has not presented a sufficient basis to warrant an equitable suspension of the 90 day complaint filing requirement. Accordingly, since Mr. Levi failed to file a viable SOX whistleblower complaint within the time frame mandated by 18 U.S.C. § 1514 A (b) (2) (D), his complaint of a violation of the Sarbanes-Oxley Act's employee protection provision must be dismissed.

[2] See attachment A to Complainant's Objection to the Motion to Consolidate and submitted by Respondent at Tab C of the Respondent's Motion to Dismiss and to Stay Proceeding.

[3] Submitted by Respondent at Tab F of the Respondent's Motion to Dismiss and to Stay Proceeding.

Consolidate. Subsequently the Complainant asked me to remove Respondent's record counsel and asked me to strike certain witnesses. On August 15, Complainant filed an "Objection" and Motion to Compel Discovery. On August 28, Complainant filed an "Initial Brief…&Motion to Strike ABI's Intended Witnesses".

On September 8, 2006 I held a telephone conference. See Transcript ("TR").I asked the parties whether there had been any testimony or affidavits presented in the first case. None was presented. I asked the Complainant if he had any testimony to offer in this case. He did not. I advised the Complainant that he had a right to be represented, I read the rules regarding summary decision into the record, and I gave the Complainant thirty days to respond to the Motion to Dismiss or amend his complaint. Subsequently, Complainant in a "Supplemental" response to the Motion to Dismiss, alleged that record counsel to Respondent made a false statement in the telephone hearing.

On October 11, Complainant filed a Supplement to his Objection to the Motion to Dismiss. He alleged that Respondent gave false statements in "government investigations" and alleged that one of Respondent's lawyers provided me with false information during the telephone conference. No affidavits or transcripts were presented.

Summary Decision

The standard for granting summary decision under the Department of Labor rules is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. Thus, pursuant to 29 C.F.R. § 18.40(d), I may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. ***Anderson v. Liberty Lobby, Inc.,*** 477 U.S. 242, 248 (1986). " A "material fact" is one whose existence affects the outcome of the case. ***Hasan v. Burns & Roe Enterprises, Inc***., ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001).

In this case, the first part of the claim is predicated on the allegation that false information has been submitted by counsel, first in the prior claim and second in the recent telephone conference. These are the statements offered as fraud and perjury and which lead to the Respondent's failure to rehire and blacklist the Complainant.

All of the statements relied upon come from counsel for the Respondent. I gave the Complainant an opportunity to provide evidence otherwise. Statements by counsel in a brief do not constitute "evidence." ***Peoples v. Brigadier Homes, Inc***., 87-STA-30 (Sec'y June 16, 1988); ***Powell v. COBE Laboratories, Inc***., 208 F.3d 227 (10th Cir., 2000). I also accept that statements by counsel are not evidence when made in a telephone conference. I recognize that counsel had a duty of candor to the tribunal. See ABA Model Rule of Professional Conduct Rule 3.3 Candor Toward The Tribunal, (a).

> A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

Taking the evidence at best light, the allegation regarding the alleged false statement in the first case is that it goes to the Complainant's credibility rather than a material fact. In his complaint and "Initial Brief", Complainant alleges that the false statements were contained in the Motion to Dismiss filed in the first case. The alleged bases for the claim are statements made by Respondent's counsel. See TR at 13.

After a review of the transcript in this case, I can not determine what the alleged false statement might have been.

> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
>
> There is no allegation that this section is applicable to the allegations made in this case..
> or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.
>
> So far, no evidence has been offered in either case.

In this case, the Complainant has not offered proof that the words alleged were material to the denial of his first claim. In fact, a reading of the Proposed Decision and Order, and the Order on Reconsideration, the claim was dismissed as untimely and the merits were not considered by Judge Stansel Gamm.[4]

Also, in the Complaint dated May 23, 2006,[5] Complainant states that the second claim was filed because Judge Stansel Gamm did not entertain his objections to the Respondent's alleged lying in the first case. I also note that the Complainant filed this claim before he appealed the first claim.

Second Claim under the SOX Statute

In order to prevail in a retaliation claim, the predicate to proceeding to decision requires a *prima facie* showing that the Complainant was engaged in a protected activity when the alleged harm occurred. As the claimant did not initiate a viable claim in the first claim, i.e. it was untimely. In the alternative, I find that the allegation of retaliation in the first case does not give rise to whistleblower protection.

However, the Complainant did file a whistleblower claim, and Complainant does assert that the Respondent failed to rehire him and blacklisted him. Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. . . . In addition, blacklisting requires an objective action–there must be evidence that a specific act of blacklisting occurred. Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place. ***Pickett v. Tennessee Valley Authority***, ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18, slip op. at 8-9 (ARB Nov. 28, 2003).

---

[4] Complainant does relate n incident that occurred in November, 2001, in which the Complainant was threatened by another attorney for Respondent. See "Initial Brief" at pp 8-9.

[5] Submitted by Respondents at Tab A, of Respondent's Motion to Supplement Its Motion Consolidate and Stay Proceedings.

The alleged refusal to hire and/or blacklisting claim does not resurrect the complaint in the first case. See ***Garn v. Benchmark Technologies***, 88-ERA-91 (Sec'y Sept. 25, 1990). Also see discussion re issue preclusion and *res judicata*, below.

After a full review of the Complainant's responses, the Complainant fails to meet his burden to allege a compensable claim of blacklisting. He also does not allege any facts which would show that he was not rehired because he had filed the first claim. At this stage of the litigation, he did not have to prove retaliation by a preponderance of the evidence. In opposing summary judgment, he had only to produce sufficient evidence that a genuine fact exists as to whether Respondent wrongfully refused to rehire him or blacklisted him. He did not allege the existence of any evidence that Respondent wrongfully refused to rehire or blacklisted him, and therefore, I find that no independent action exists in this record. ***Rockefeller v. U.S. Dept. of Energy***, Order of Consolidation and Final Decision and Order of Dismissal, In Part, and Remand, In Part (ARB Aug. 31, 2004), Order Denying Reconsideration (ARB May 17, 2006).

I also find that no continuing violation is alleged.

Res Judicata and Issue Preclusion

The Complainant brought up the allegation regarding statements of counsel in the first case. He also brought the same allegation to Judge Stansel Gamm. TR, 6 at lines 15-22.

Res judicata (from "res iudicata", Latin for "a matter [already] judged") is a common law doctrine meant to bar relitigation of cases between the same parties in court. *Res judicata* does not restrict the appeals process, which is considered a linear extension of the same lawsuit as it travels up (and back down) the appellate court ladder. Appeals are considered the appropriate manner by which to challenge a judgment rather than trying to start a new trial, and once the appeals process is exhausted or waived, *res judicata* will apply even to a judgment that is contrary to law.

The purpose of res judicata is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." ***Allen v. McCurry,*** 449 U.S. 90, 94 (1980). In order for Respondent to prevail, (1) the prior judgment must have been rendered by a forum with competent jurisdiction; (2) the prior judgment must have been a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. See ***Greenwald v. The City of North Miami Beach***, 1978-SDW-1 (Sec'y Apr. 3, 1978), aff'd, ***Greenwald v. North Miami Beach, 587*** F.2d 779 (5th Cir. 1979), *cert. denied*, 44 U.S. 826 (1979); ***Greenwald v. The City of North Miami Beach***, 80-SDW- 2 (Sec'y Apr. 14, 1980).

Again, I note that the same allegation regarding fraud or perjury are part of the appeal of the first case. TR 13. Since the Complainant admits that the issue regarding fraud or perjury are part of the appeal, I should not have to re-litigate it.

Given a recent determination, however, that an Initial Decision may not be considered a "final adjudication" for purposes of applying relief,[6] I also discuss, other bases for not re-litigating the same issue. "Issue preclusion" generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim. ***New Hampshire v. Maine***, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968, (2001). Under issue preclusion principles, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a

[6] ***Welch v. Cardinal Bankshares Corp***., No. 06-00407 W.D. Va., (October 5, 2006).

different cause of action involving a party to the first case." ***Robinson v. Volkswagenwerk AG***, 56 F.3d 1268, 1272 (10th Cir.1995) (citing ***Allen v. McCurry***, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)). "Under the doctrine of collateral estoppel, ... the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." ***Parklane Hosiery Co. v. Shore***, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5, 58 L.Ed.2d 552 (1979). Four requirements must be met before a finding in a previous action is conclusive in the instant action: (1) the issue must be identical to that involved in the prior proceeding; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. See ***Farmland Indus. Inc. v. Morrison Quirk Grain Corp***., 987 F.2d 1335, 1339 (8th Cir.1993).

The law of the case doctrine "is a prudential principle that 'precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided.'" ***Field v. Mans***, 157 F. 3d 35, 40 (1st Cir. 1998)(quoting ***Commercial Union Ins. Co. v. Walbrook Ins. Co., Ltd***., 41 F.3d 764, 770 (1st Cir. 1994)). The aspect of law of the case which applies in this circumstance, referred to as the "mandate rule," "instructs an inferior court to comply with the instructions of a superior court on remand." ***Field v. Mans***, supra, 157 F.3d at 40. See ***Law v. Medco Research, Inc***., 113 F.3d 781, 783 (7th Cir. 1997) (doctrine requires lower adjudicatory body to conform further proceedings in case to principles set forth in appellate opinion unless there is compelling reason to depart). The doctrine applies within administrative agencies as well. When this Board has ruled on a question of law, the law of the case doctrine binds an administrative law judge acting after a remand of the case. See, e.g., ***Ruud v. Westinghouse Hanford Co***., No. 1988 ERA 33, ALJ RD&O on Remand, Dec. 8, 1988, at 5.

I accept that Mr. Levi is now barred by the doctrine of issue preclusion and the law of this case from re-litigating whether he was a whistleblower in the previous case. See ***Sawyers v. Baldwin Union Free School District***, No. 85 TSC 00001, slip op. at 18 (Sec'y Oct. 24, 1994); ***Agosto v. Consolidated Edison Co***., ARB Nos. 98 007, 98 152, ALJ Nos. 96 ERA 2, 97 ERA 5, slip op. at 6 (ARB July 27, 1999).

Even if the Complainant pled a new cause of action relating to the events before Judge Stansel Gamm, I can not accept that he has a viable whistleblower act retaliation claim based on allegations of lying and perjury as he has not identified any evidence relating to them.

FINDINGS OF FACT AND CONCLUSION

The Complainant asserts that false statements made by opposing counsel on a Motion to Dismiss a SOX whistleblower give rise to an independent action for whistleblowing in a second case. The record shows that the alleged false statements were objected to and are, in part, a basis for appeal of the first case. I find that any allegation regarding false statements are subsumed in the earlier action. Moreover, Complainant has not shown that the words alleged give rise to a further independent action under the Sarbanes Oxley Act, as his first case was dismissed as untimely no evidentiary development was submitted to Judge Stansel Gamm, no affidavits or deposition testimony, no verified pleadings, and therefore the fraud or perjury alleged did not arise in the first action. Conversely, if they are accepted as disputed material facts, they are already part of his appeal in the first case.

The Complainant further alleges that the Respondent has refused to rehire him and blacklisted him because he filed and participated in the earlier action. I find that there are no genuine issues as to any material fact relating to the alleged refusal to hire and blacklisting. The

Complainant has failed to provide any facts to substantiate his allegations.

MOTION TO EXCLUDE RESPONDENT'S COUNSEL

I find that the allegation of fraud (and perjury) against counsel remains unproved, and therefore the motion to remove him is **DENIED**.

MOTION TO STAY

As I find that the issues regarding any fraud o perjury are subsumed in the first case, after having been fully advised in these premises, the Respondent's Motion to Stay is **GRANTED**. All other requests regarding evidence, including the Motion to exclude a witness, and any pending discovery are now moot.

RECOMMENDED DECISION AND ORDER OF DISMISSAL

The Respondent's Motion for Summary Decision is **GRANTED**. The SOX complaint of Mr. **HUNTER R. LEVI** is **DISMISSED**.

SO ORDERED:

A

DANIEL F. SOLOMON
Administrative Law Judge

Washington, D.C.

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 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).