



Issue Date: 23 January 2007

Case No.: 2006-SOX-00113

In the Matter of

DAVID SMITH

Complainant

v.

CORNING, INC.

Respondent

**ORDER DISMISSING COMPLAINANT'S COMPLAINT UPON
REMOVAL OF THE COMPLAINT TO FEDERAL DISTRICT COURT**

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” to employees who “provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee 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 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) 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). The Secretary of the Department of Labor, through her agency The Occupational Safety and Health Administration (“Secretary”, hereinafter), is authorized by the Act to conduct investigations into complaints. Parties may appeal the findings of the Secretary to the United States Department of Labor’s Office of Administrative Law Judges. Pursuant to 18 U.S.C. § 1514A(b)(1)(B), an individual seeking relief may bring an action at law for *de novo* review in federal district court if the Secretary has not issued a final decision within 180 days of the filing of the complaint through no fault of the Complainant.

Complainant David Smith (“Complainant”) filed a complaint against Corning, Inc. (“Respondent”) under the Act with the Secretary on January 16, 2006. After investigation, on June 22, 2006, the Secretary issued her finding that there was no reasonable basis for his complaint. On July 19, 2006, Complainant filed an appeal of that finding and complaint with the Office of Administrative Law Judges, seeking a formal hearing. The matter was assigned to me,

and by Order and Notice issued on August 1, 2006, I scheduled a hearing in the matter for October 5 and 6, 2006.

On September 8, 2006, I granted Respondent's motion to compel the deposition of the Complainant, granted in part the Claimant's motion for continuance by setting the date of the hearing for November 1 and 2, 2006, and set deadlines for the close of discovery and the filing of motions. On September 11, 2006, I received, by telefax, written notice from the Claimant's counsel of the Claimant's intention to file a complaint in federal district court.

On September 20, 2006, I held a telephone prehearing conference with counsel for the parties. After the prehearing conference, on that same date, I issued an order holding in abeyance the discovery period until October 18, 2006 and ordered the Complainant to provide me, immediately upon filing, a receipted copy of any Complaint filed in United States District Court. Further, my order informed the parties that if the Complainant did not file a Complaint in District Court on or before October 18, 2006, the discovery period was to resume, and would close on November 3, 2006.

On October 17, 2006, counsel for the Complainant informed my office that a Complaint had been filed in United States District Court, Western District of New York, and provided my office with the docket number. On October 26, 2006, counsel for the Complainant submitted to me a copy of the Complaint, Case No. 06-CV-6516 CJS(F), David E. Smith v. Corning Incorporated and D'Ann Grell, filed in United States District Court, Western District of New York, on October 17, 2006. The district court Complaint alleges that the Respondent discriminated against the Plaintiff, who is the Complainant in this matter, and cites the Sarbanes-Oxley Act as a basis for jurisdiction.

The filing of a proper Complaint in United States District Court vests jurisdiction in that Court, and consequently divests the Department of Labor of administrative jurisdiction. See Stone v. Duke Energy Corp., 432 F.3d 320 (4th Cir. 2005). The Complainant filed his complaint with the Secretary on January 16, 2006, and more than 180 days passed prior to the Complainant's filing of his district court complaint on October 17, 2006. Accordingly, I must relinquish jurisdiction in this matter.

ORDER

I hereby DISMISS the complaint of David Smith before the Department of Labor, Office of Administrative Law Judges.

A

Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey