U.S. Department of Labor

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Issue Date: 13 March 2007

Case No.: 2006-SOX-00017

In the Matter of:

MICHAEL DAVIS,
Complainant,

v.

THE HOME DEPOT U.S.A., INC.,
Respondent.

Case No.: 2006-SOX-00129

In the Matter of:

ELLEN SHARP,
Complainant,

v.

THE HOME DEPOT U.S.A., INC.,
Respondent.

Case No.: 2007-SOX-00013

In the Matter of:

ROGER FREDRICKSON,
Complainant,

v.

THE HOME DEPOT U.S.A., INC.,
Respondent.

ORDER DENYING COMPLAINANTS' MOTION FOR CONSOLIDATION

The three cases that are the subject of this order involve complaints filed according to the employee protection provisions of the Sarbanes-Oxley Act of 2002 ("Act"), codified at 18 U.S.C. § 1514A, *et seq*. A hearing in case number 2006-SOX-00017 ("Davis Matter") occurred before Administrative Law Judge Pamela Wood in Washington, DC, in 2006. A hearing in case number 2006-SOX-00129 ("Sharp Matter") is scheduled to be heard by Judge Wood on April 16, 2007, in Washington, DC. A hearing in case number 2007-SOX-00013 ("Fredrickson Matter") is scheduled to be heard by Judge Lee Romero on April 16, 2007, in Birmingham, Alabama. Complainants Davis, Sharp, and Fredrickson shall be referred to as "the Complainants" when they are discussed as a group.

On February 22, 2007, the Complainants submitted a "Motion for Consolidation of Hearing of the Above-Referenced Cases to Judge Pamela Lakes Wood," in accordance with 29 C.F.R. § 18.11.[1] In that Motion, the Complainants argue that the three claims should be consolidated because the Complainants' counsel and the Respondent's counsel are the same in all three cases, with the exception of the engagement of local counsel to assist the Respondent in the Fredrickson Matter in Birmingham, Alabama.

Additionally, the Claimants argue that the three claims should be consolidated because the subject matter is the same in all three claims. According to the Complainants' motion, each Complainant claims that he or she was retaliated against for protesting the Respondent's required practice concerning "Return to Vendor" credits ("RTV"). As a result, the Complainants suggest that the claims should be consolidated and assigned to Judge Wood because she has already heard one of the three claims – the Davis Matter[2] – and is familiar with the subject matter. The Complainants argue that the hearings in the Sharp and Fredrickson Matters will repeat and be bolstered by the testimony in the Davis Matter. The Complainants suggest that the Fredrickson hearing could be held in Washington, DC, to avoid unnecessary costs of travel and duplication of testimony. The Complainants concluded that the three claims should be consolidated under 29 C.F.R. § 18.11 in the interest of judicial economy.

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[1] Twenty nine C.F.R. §18.11 states

> When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge or the administrative law judge assigned may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings may be made and the evidence introduced in one matter may be considered as introduced in the others, and a separate or joint decision shall be made, at the discretion of the administrative law judge as appropriate.

[2] Complainant Davis intends to file a motion to reopen testimony in his case as a result of new evidence that was not revealed during the course of discovery.

The Respondent opposed the Complainants' Motion for Consolidation in a Response submitted on March 6, 2007. The Respondent first argued that it would be improper to allow consolidation of the Davis Matter with the Sharp and Fredrickson Matters because the Davis Matter is not a hearing "to be held" in accordance with 29 C.F.R. § 18.11. The Respondent noted that the Davis Matter was tried in April and June of 2006 and the parties are ready to file post-hearing briefs. The Respondent contends that halting the process in the Davis Matter to consolidate it with two cases that have not yet been heard would deprive the Respondent of its right to prompt adjudication under the Act. Additionally, the Respondent argues that even if Complainant Davis succeeds in reopening the record, the hearing has concluded and any reopening would be for a very limited purpose. As a result, the Respondent argues that holding up the Davis Matter for the purposes of consolidation would only accomplish delay in a matter that has otherwise been concluded and awaits adjudication.

Secondly, the Respondent argues that the Sharp and Fredrickson matters should not be consolidated because they do not arise out of common facts and do not have the same or substantially similar evidence. Complainant Sharp claims that she was fired from the Respondent's Aspen Hill store in Maryland because she complained about the Respondent's RTV practices, received a subpoena to testify in the Davis Matter, and because she was discriminated against on the basis of race, gender, and age. The Respondent will assert that Complainant Sharp was fired because she violated the Respondent's shoplifter apprehension policy. On the other hand, Complainant Fredrickson alleges that he was discharged from the Respondent's Pell City, Alabama, store because he complained to a co-worker about the type of mark-down he had to record for an item that was not damaged. The Respondent will assert that Complainant Fredrickson was discharged for punching a vendor in the groin. The Respondent explained that mark-downs concern the marking down of the sales price of an item that is damaged in the store while RTV practices involve returning defective products to the vendor. As a result of this distinction between the protected activities that are at issue in each of the claims and the differing allegations, the Respondent argues that the evidence in the Sharp and Fredrickson Matters is not the "same or substantially similar," as require for consolidation under 29 C.F.R. § 18.11.

And, finally, the Respondent argued that the three claims should not be consolidated because moving the Fredrickson case from Alabama to Washington, DC, would require the Respondent to incur the expense of bringing its witnesses from Alabama and would cause significant inconvenience to the witnesses.

After reviewing the Complainants' motion and the Respondent's response, I conclude that there is no compelling reason to consolidate the Davis, Sharp, and Fredrickson Matters. The hearing in the Davis Matter was completed several months ago and is at a very different stage of litigation than the Sharp and Fredrickson Matters. Additionally, the Sharp and Fredrickson Matters involve different alleged acts taking place in different stores in different regions of the country. As a result, the Sharp and Fredrickson Matters do not involve the "same or substantially similar evidence" and the evidence in one hearing may not be relevant or material to the other. As a result, the Complainants' request to consolidate the hearings must be denied.

In light of the foregoing, it is hereby **ORDERED** that the Complainants' Motion for Consolidation is **DENIED**.

A

John M. Vittone
Chief Administrative Law Judge