



In the Matter of:

JACK R. T. JORDAN,

**ARB CASE NOS. 10-113
11-020**

COMPLAINANT,

**ALJ CASE NOS. 2006-SOX-098
2010-SOX-050**

v.

SPRINT NEXTEL CORPORATION, et al., DATE: June 29, 2012

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jack R. T. Jordan, Esq., *pro se*, Parkville, Missouri

For the Respondents:

Eugene Scalia, Esq., Joshua D. Hess, Esq., Jennifer J. Schulp, Esq., and Jason J. Mendro, Esq., *Gibson, Dunn & Crutcher LLP*, Washington, District of Columbia

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Lisa Wilson Edwards, *Administrative Appeals Judge*

NOTICE OF DISMISSAL

Jack R. T. Jordan has filed complaints with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) in the above-captioned cases. The complaints allege that Sprint Nextel Corporation (Sprint) and other named respondents violated the employee protection provisions at Section 806 of the Sarbanes-Oxley Act of 2002 (SOX).¹ A Department of Labor (DOL) Administrative Law Judge

¹ 18 U.S.C.A. § 1514A (West Supp. 2008). Implementing regulations appear at 29 C.F.R. Part 1980 (2011).

(ALJ) granted Sprint's and the other named Respondents' motions to dismiss and dismissed the complaints. Jordan has appealed the dismissal of his complaints.

BACKGROUND

Jordan was employed as an in-house attorney with Sprint's Corporate Secretary and Corporate Governance group in Kansas from January 2003 until April 2005.² Sprint's shares are publicly traded on the New York Stock Exchange.³

On April 11, 2005, Jordan filed a complaint with OSHA (*Jordan I*) alleging that Sprint retaliated against him in violation of the whistleblower protection provisions at SOX Section 806. While Jordan's original complaint in *Jordan I* was pending, Jordan filed a second complaint with OSHA on March 22, 2006 (*Jordan II*). In *Jordan II*, Jordan alleges that Sprint, attorneys for Sprint, and other named Respondents violated the whistleblower protection provisions at SOX Section 806 by, in part, making false allegations about Jordan in their responses to Jordan's original complaint filed with OSHA in *Jordan I*. Jordan ultimately filed hearing requests on both complaints with the Department of Labor's Office of Administrative Law Judges (OALJ).

On March 14, 2006, a Department of Labor Administrative Law Judge (ALJ) granted Sprint's motion to certify to the Administrative Review Board for interlocutory review Jordan's complaint in *Jordan I* and on March 28, 2006, Sprint petitioned the Board for interlocutory review in *Jordan I*. By order dated June 23, 2006, while Sprint's petition for interlocutory review in *Jordan I* was pending before the Board, the ALJ, to whom Jordan's complaints were assigned, consolidated Jordan's complaints (*Jordan I*, ALJ No. 2006-SOX-041, and *Jordan II*, ALJ No. 2006-SOX-098) and stayed them pending the Board's resolution of Sprint's petition for interlocutory review in *Jordan I*.

After granting Sprint's petition for interlocutory review, the Board remanded *Jordan I* to the OALJ on September 30, 2009.⁴ Shortly thereafter on January 19, 2010, Jordan filed a third SOX complaint with OSHA (*Jordan III*). In *Jordan III*, he alleged that Sprint and other named respondents violated Section 806 by making false statements (pertaining to *Jordan I* and *Jordan II*) in a letter to the SEC. Jordan ultimately filed a request for a hearing in his third complaint with the OALJ. All three of Jordan's complaints were reassigned to a new ALJ.

² See *Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 2 (ARB Sept. 30, 2009).

³ *Id.* In August 2005, Sprint merged with Nextel Corporation to form Sprint Nextel. *Jordan*, ARB No. 06-105, slip op. at 2, n.3.

⁴ *Jordan I*, ARB No. 06-105, slip op. at 18.

On May 21, 2010, the ALJ granted Sprint's and the other named Respondents' motion to dismiss *Jordan II* (ALJ No. 2006-SOX-098). Similarly, on December 6, 2010, the ALJ granted Sprint's and the other named Respondents' motion to dismiss *Jordan III* (ALJ No. 2010-SOX-050). Jordan appealed the dismissal of his complaints in *Jordan II* and *Jordan III* to the Board. Several months later, on May 24, 2011, the ALJ dismissed *Jordan I*, in light of Jordan's notice of intent to proceed de novo in U.S. District Court.⁵

Consequently, while *Jordan II* and *Jordan III* are currently before the Board, *Jordan I* is not now before us. A review of federal district court dockets to date indicates that Jordan has not yet pursued his original complaint in *Jordan I* in U.S. District Court.⁶ On May 10, 2012, the Board issued an Order to Show Cause whether *Jordan II* and *Jordan III*, which are pending before us, should be dismissed so that Jordan can consolidate those cases with *Jordan I*. In the Order, the Board noted the commonality of Jordan's three complaints; that the complaints shared similar factual backgrounds, the same or similar evidence, procedural history and legal issues, and involved the same attorneys and parties. The Board stated that consolidation of Jordan's three complaints would serve to avoid inconsistent rulings in different forums and would be in the interest of judicial economy. In addition, the Board observed that consolidating the complaints appeared to be in the interest of the parties and not prejudicial to their interests. Accordingly, the Board ordered the parties to show cause why the Board should not

⁵ See *Jordan v. Sprint Nextel Corp.*, ALJ No. 2006-SOX-041 (May 24, 2011) (Order of Dismissal).

⁶ 18 U.S.C.A. § 1514A(b) of the SOX provides:

A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c) by - (A) filing a complaint with the Secretary of Labor; or (B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

As a U.S. District Court has noted, however, “[t]here is no requirement or even reference [in the SOX] as to when the complainant must file his complaint in the district court after giving his fifteen day notice to the Board or administrative law judge.” *Ellis v. CommScope, Inc. of N.C.*, Civil Action No. 3:07-CV-1938-G, 2008 WL 4191482, slip op. at 4 (N.D. Tex., Sept. 11, 2008)(unpub.)(determining the timeliness of a SOX whistleblower complaint filed in U.S. District Court after its removal from the DOL by applying the limitations period for fraud actions under the SOX at 28 U.S.C.A. § 1658(b)(1), (2), which requires filing of the action no later than the earlier of (1) two years after the discovery of the facts constituting the claim, or (2) five years after the violation).

direct Jordan to file with the Board a notice of his intention to proceed de novo in U.S. District Court with *Jordan II* and *Jordan III* and thereby allow the Board to dismiss those cases so that they may be consolidated with *Jordan I* for the purposes of hearing and adjudication.

DISCUSSION

In response to the Board's Order to Show Cause, Jordan contends that *Jordan II* and *Jordan III* cannot be properly consolidated with *Jordan I*, nor is it timely to consider such consolidation, because cases to be consolidated must be before the same court and involve a common question of law or fact. Jordan asserts that *Jordan II* and *Jordan III* do not involve questions of law or fact in common with *Jordan I*. Moreover, Jordan argues that under the SOX and its implementing regulations, a complainant has the right to determine whether and when to proceed with his or her complaint de novo in U.S. District Court.⁷

Sprint has also responded, stating that it did not object to or oppose the dismissal of the appeals in *Jordan II* and *Jordan III* based either on Jordan's notice of intent in *Jordan I* to proceed de novo in U.S. District Court or the Board's discretion to deny a Petition for Review of the ALJ's dismissals of *Jordan II* and *Jordan III* pursuant to 29 C.F.R. § 1980.110(a).

While we appreciate Jordan's argument that he should not be "compelled" to proceed with his complaints in *Jordan II* and *Jordan III* in U.S. District Court, we note that it was *his* decision to remove the principle, original complaint in *Jordan I* to U.S. District Court shortly after the ALJ dismissed *Jordan II* and *Jordan III*. We cannot countenance Jordan's desire to proceed with his complaints in different forums, as it would endorse and encourage forum-shopping and piecemeal litigation of SOX complaints. Furthermore, this Board retains complete discretion whether to accept his petitions for review.⁸

As we have noted previously, it would be inefficient to decide Jordan's three cases separately and possibly result in inconsistent rulings. Since *Jordan I* has not yet been filed, much less litigated, all of Jordan's complaints may be decided in conjunction with *Jordan I* on which they are based. All three of Jordan's complaints derive from the same or overlapping facts. For instance, *Jordan II* is based, in part, on the responses Sprint and other named respondents filed with OSHA to Jordan's original complaint in *Jordan I*. Indeed, *Jordan I* and *Jordan II* were originally consolidated for purposes of adjudication before the ALJ initially assigned to the cases. When faced with a substantial identity of legal issues and a commonality of much of the evidence, and in the interest of

⁷ See 18 U.S.C.A. § 1514(A)(b)(1)(B); 29 C.F.R. § 1980.114(a).

⁸ See 29 C.F.R. § 1980.110(b).

judicial and administrative economy, courts have consolidated appeals or cases for the purpose of review and decision.⁹

We note that under the procedures for the handling of discrimination complaints under Section 806 of the SOX, 29 C.F.R. § 1980.115 provides:

In special circumstances not contemplated by the provisions of this part, or for good cause shown, the administrative law judge or the Board on review may, upon application, after three days notice to all parties and interveners, waive any rule or issue any orders that justice or the administration of the Act requires.

29 C.F.R. § 1980.115 (emphasis added). Consequently, pursuant to our authority under 29 C.F.R. § 1980.115, and for good cause shown, we hereby give the parties notice that we intend to order that the above-captioned complaints in *Jordan II* and *Jordan III* be dismissed thirty days from the issuance of this Notice of Dismissal. We also give Jordan leave to file with the Board within thirty days from the issuance of this Notice of Dismissal a notice of intent to proceed de novo in U.S. District Court with his complaints in *Jordan II* and *Jordan III*.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

⁹ See *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 04-115; ALJ Nos. 2004-SOX-020, -036; slip op. at 6 (ARB June 2, 2006). See Federal Rule of Civil Procedure 42(a):

If actions before the court involve a common question of law or fact, the court may: 1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or 3) issue any other orders to avoid unnecessary cost or delay.