U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 April 2007

CASE NO. 2007-SOX-0019

In the Matter of:

CAROLE COPPINGER-MARTIN,
Complainant,

vs.

NORDSTROM, INC.,
Respondent.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS AND ORDER DISMISSING THE COMPLAINT

This proceeding arises under the employee protection provisions of the Sarbanes-Oxley Corporate and Criminal Accountability Act of 2002 (the Act or "SOX"), 18 U.S.C. § 1514A.

On February 13, 2007, I issued an order setting forth a schedule for discovery and briefing on the issue of timeliness of complaint filing with the Department of Labor. On March 2, 2007, Respondent filed a motion to dismiss for failure to present a prima facie case and for failure to timely file ("Respondent's motion" or "RM"). Complainant filed a notice on March 8, 2007, stating that she believes discovery is required to respond to summary judgment motion. On March 9, 2007, I issued an order denying Complainant's request for discovery as unnecessary, inappropriate, and inefficient at this stage, but allowing Complainant to present additional arguments in her response as to why discovery is necessary and what evidence she expects to find through discovery. I also directed Complainant to respond only to the issues of timeliness and equitable estoppel raised in Respondent's motion, as I would be disregarding the substantive issues related to Complainant's prima facie case. On March 16, 2007, Complainant filed her response to Respondent's motion to dismiss ("Complainant's response" or "CR"). On March 23, 2007, Respondent filed its reply ("Respondent's reply" or "RR").

Relevant Factual Allegations

Complainant alleges that she engaged in protected activity in the summer of 2005, when she told her immediate supervisor, Dan Little, that "there were potential SEC concerns because the information securities vulnerabilities make '[Respondent's] published privacy policy…a misrepresentation to its shareholders.'" CR at 3.

It is undisputed that, in mid-November 2005, Mr. Little informed Complainant that her employment would be terminated around the end of the fiscal year in late January 2006. RM at 8, 13; CR at 3. Then, in late November or early December 2005, Mr. Little agreed to extend Complainant's employment to February 28, 2006 to allow her stock options to vest. RM at 10.

Respondent alleges that in January 2006, discussions and meetings were held related to the transitioning of Complainant's duties and completion of her projects. RM at 9-10. Complainant, on the other hand, alleges that there were no plans, meetings, trainings, or directions for transfer of her duties, work, or files. CR at 4-5.

Complainant went on leave for elective surgery on January 19, 2006, and she returned to work in early March 2006. RM at 10, 12. When Complainant had not completed her projects or the transitioning of her work by March 15, 2006, Mr. Little agreed to extend her termination date until late April 2006. RM at 10. In March 2006, Complainant raised concerns about Respondent's compliance with Payment Card Industry standards. RM at 10-12.

Complainant's last day of work was April 21, 2006. CR at 4.

On or about May 22, 2006, Complainant's counsel contacted Respondent's general counsel to discuss her severance agreement and possible claims against Respondent. RM at 12; CR at 5. On June 5, 2006, Complainant's counsel met with Respondent's general counsel to further discuss her potential claims and SEC-related concerns. RM at 12; CR at 5.

Complainant alleges that on July 19, 2007, Sergei Kalfov, another Respondent employee, informed her that many of her former job functions were being performed by other employees and another Respondent employee, Pepper Schenne, confirmed this in August 2006. CR at 6.

In September 2006, Complainant's counsel notified Respondent that she was planning to file a SOX claim. RM at 12. On October 13, 2006, Complainant filed a SOX complaint with the Occupational Safety and Health Administration ("OSHA"). RM at 13; CR at 6-7.

Parties' Arguments

In its motion to dismiss, Respondent argues that the 90-day statute of limitations began to run in mid-November 2005 when Complainant was informed that her employment would be terminated in early 2006. RM at 15. The statute of limitations would have expired in mid-February 2006. RM at 15. In the alternative, Respondent argues that Complainant's complaint is not timely even assuming that the statute of limitations did not begin to run until her last day of employment on April 21, 2006. RM at 15. Under this assumption, the 90-day statute of limitations would have run on or about July 21, 2006.

Respondent also argues that equitable estoppel should not apply because Complainant cannot show that Respondent misrepresented or concealed facts establishing her claim or that she relied on any such misrepresentation. RM at 16-17. First, Respondent asserts that while Complainant correctly understood that no one employee was going to perform her exact job duties after she left, she was also aware of and participated in the transferring of her duties and her employees to other supervisors. RM at 17-19. Thus, Respondent argues that it did not misrepresent or conceal any facts and that Complainant was not deceived in any way with regard to the status of her position or her duties after she left. RM at 17-20. Second, Respondent argues that, even if it did misrepresent or conceal facts regarding her termination, Complainant did not

rely on those representations because she reported to others as early as November 2005 that she suspected that the reasons given for her termination were pretextual (for sex discrimination retaliation, not SOX retaliation). RM at 20. Lastly, Respondent argues that equitable estoppel is inapplicable because Complainant was represented by counsel and she must bear the consequences of her attorneys' acts and omissions. RM at 21.

In her response, Complainant first asserts that there are material issues of fact that prevent granting Respondent's motion. In particular, Complainant argues that there are issues of fact regarding if and when Complainant understood that her duties were going to be transferred to other employees rather than completely eliminated. CR at 11-13. There are also issues of fact regarding if and when Complainant raised concerns about retaliation for sex discrimination complaints or otherwise suspected that Respondent's stated reasons for terminating her were pretextual. CR at 12-13.

Second, Complainant argues that equitable estoppel applies as a matter of law because Respondent misrepresented or concealed facts necessary to support a SOX claim and she reasonably relied on its representations. CR at 14. Complainant asserts that she believed that her position was being eliminated for budgetary reasons because there were no plans, meetings, trainings, or instructions for transferring her duties or files to other employees. CR at 4-5. Complainant asserts that she did not suspect Respondent's stated reasons for eliminating her position were untrue until July 19, 2006, when she learned from Sergei Kalfov, another employee, that many of her job functions had been transferred to other employees. CR at 6. Thus, Complainant asserts that she had no basis for filing a SOX claim until July 19, 2006, and consequently, the statute of limitations did not begin to run until that date. CR at 7, 16. Complainant also argues that even if she or her counsel believed that her termination was retaliation for sex discrimination complaints or that her termination was related to SEC violations, that does not prove that they knew enough facts to make a SOX claim. CR at 16-18.

Lastly, Complainant argues that she should be allowed to conduct discovery related to the issues of timeliness and equitable estoppel. CR at 18-19. All of the discovery that Complainant would have sought goes to prove generally that Complainant reasonably believed that her position was being eliminated for budgetary reasons and her job duties would not be performed by others. CR at 18-19.

In its reply, Respondent asserts that a complainant is required to file a claim upon notice of the injury or adverse employment action, and is not entitled to wait until she has acquired evidence of the employer's retaliatory motivation. RR at 2-3, citing *Halpern v. XL Capital Ltd.,* 2004-SOX-54 (ARB)(Aug. 31, 2005). Thus, Respondent argues that Complainant should have filed her claim within 90 days of receiving notice of her termination in mid-November 2005, regardless of whether she had reason to suspect or evidence to prove that her termination was retaliatory. RR at 3. Respondent argues that it was not misrepresenting or concealing any facts necessary to a SOX claim because Complainant and her attorneys were aware of her alleged protected activity and the notice of her termination, and could infer retaliation from the close timing of those events. RR at 5-7. Respondent notes that the statute of limitations begins to run "upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong." RR at 6, citing *Wastak v. Lehigh Valley Health Network*, 33 F. 3d 120, 126 (3d Cir. 2003);

Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994). Thus, whether Complainant's job duties would continue to be performed by others or whether Employer's stated reasons for terminating Complainant were pretextual were not necessary elements to the filing of her SOX claim. RR at 7.

Legal Analysis

A SOX complaint must be filed with the Secretary of Labor (OSHA) within 90 days of the alleged violation. 18 U.S.C. § 1514A(b). The regulations clarify that the alleged violation occurs "when the discriminatory decision has been both made and communicated to the Complainant." 29 C.F.R. § 1980.103. Thus, the 90-day statute of limitations begins to run when the employee is made aware of the employer's decision to terminate her, not when the employee is actually terminated or otherwise experiences the consequences of the employer's decision. *Richardson v. JPMorgan Chase & Co.*, 2006-SOX-82 (ALJ July 7, 2006); *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, slip op. at 36 (Apr. 30, 2001). However, the statute of limitations does not begin to run until the employee receives "final, definitive, and unequivocal notice" of the adverse employment decision. *Halpern v. XL Capital, Ltd.,* ARB Case No. 04-120, ALJ Case No. 2004-SOX-54, slip op. at 3-4 (ARB)(Aug. 31, 2005)(citing *Jenkins v. U.S. Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1999-SWD-2, slip op. at 14 (ARB Feb. 28, 2003)). Such notice must be "decisive or conclusive, i.e., leaving no further chance for action, discussion, or change" and must be a "communication that is not ambiguous, i.e., free of misleading possibilities." *Id.* at 3.

In this case, it is undisputed that Complainant was notified in mid-November 2005 that her employment would be terminated in early 2006. RM at 8, 13; CR at 3. Whether Complainant was informed that all of her duties would be eliminated or merely that her position would be eliminated is irrelevant; the fact that Complainant would no longer be employed by Respondent was clear and was sufficient to establish an adverse employment decision. Because Complainant's termination was allegedly contingent upon completion or transfer of certain projects and because her end date was subsequently extended for various reasons, it is unclear whether the notice she received in mid-November 2005 was "final, definitive, and unequivocal." However, this issue of fact is immaterial because Complainant's complaint was not timely filed even if the statute of limitations did not begin to run until her final day of work on April 21, 2006.

Equitable tolling and equitable estoppel may be invoked in a whistleblower case to relax the statute of limitations and excuse untimely filing of a complaint. *Rzepiennik v. Archstone Smith, Inc.*, 2004-SOX-26, at 20 (ALJ)(Feb. 23, 2007). There are three limited exceptions in which equitable tolling may apply: (1) where a respondent actively misled the complainant respecting the cause of action; (2) where the complainant has in some extraordinary way been prevented from asserting his rights; or (3) where a complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School District of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3rd Cir. 1981); *Halpern*, ARB Case No. 04-120, slip op. at 4. Similarly, under the doctrine of equitable estoppel, "a late filing may be accepted as timely if an employer has engaged in 'affirmative misconduct' to mislead the complainant regarding an operative fact forming the basis for a cause of action, the duration of the filing period, or the

necessity for filing." *Halpern*, ARB Case No. 04-120, slip op. at 5. Equitable tolling focuses on the complainant's inability to obtain necessary information despite her due diligence, while equitable estoppel focuses on wrongdoing by the respondent. *Rzepiennik*, 2004-SOX-26, at 20. Complainant bears the burden of justifying the application of these doctrines. *Id.*

Regardless of whether it is labeled equitable tolling or equitable estoppel, Complainant's argument is that the untimely filing of her complaint should be excused because Respondent misrepresented or concealed facts necessary to support a SOX claim. For purposes of deciding this motion, I accept as true Complainant's allegations that Respondent misrepresented to her that her position was being eliminated for budgetary reasons and her duties would not be performed by anyone else after her departure. I also accept as true Complainant's allegations that she relied on Respondent's representations and did not suspect that these stated reasons for her termination were pretextual until learning from another employee on July 19, 2006 that her duties were being performed by others. I will also assume, for purposes of deciding this motion, that Complainant was able to obtain all of the discovery she seeks and it established the facts she has set out to prove. However, even accepting all of these factual allegations as true and assuming additional facts that may have been established through additional discovery, I find that, as a matter of law, Complainant cannot show that she is entitled to equitable tolling or equitable estoppel.

The ARB's holding in *Halpern* precludes application of equitable tolling or equitable estoppel in this case. In *Halpern v. XL Capital, Ltd.*, the Administrative Review Board ("ARB") upheld the dismissal of a complainant's SOX complaint as untimely and found that equitable tolling and equitable estoppel were not applicable. ARB Case No. 04-120, ALJ Case No. 2004-SOX 54(ARB)(Aug. 31, 2005). The ARB held that "[n]either [SOX] nor its implementing regulations indicate that a complainant must acquire evidence of retaliatory motive before proceeding with a complaint." *Id.* The complainant's failure to acquire evidence of the employer's motivation for terminating him "did not affect his rights or responsibilities for initiating a complaint pursuant to the SOX." *Id*., citing *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994) ("a claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong.").

Complainant's allegations that Respondent misrepresented to her that her duties would be eliminated and that she was not aware until July 19, 2006 that her duties actually had been transferred to other employees essentially amount to an argument that she was not required to file her claim until after she had evidence of Respondent's retaliatory motive. Under *Halpern*, this argument must be rejected. Even if Respondent did misrepresent or conceal its true reasons for terminating her, Complainant still had a right and responsibility to file her claim because motive or pretext evidence is not a necessary element to filing a claim. Complainant was required to file her claim within 90 days of receiving "final, definitive, and unequivocal notice" of her termination, regardless of whether she suspected that Respondent's stated reasons were pretextual, had evidence of Respondent's notice, or was aware that her termination constituted a legal wrong. Because equitable tolling and equitable estoppel do not apply, Complainant's complaint must be dismissed as untimely.

Accordingly, Respondent's motion to dismiss is hereby GRANTED, and Complainant's claim is hereby DISMISSED WITH PREJUDICE. The trial scheduled for July 16 -19, 2007 in Seattle, Washington is hereby CANCELLED.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge

ABT:eh

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).