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Issue Date: 13 March 2008

In the Matter of

Case No. 2007-SOX-00073

ADRIANA KOECK
Complainant

v.

GENERAL ELECTRIC CO.
Respondent

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Washington, D.C.
For the Complainant

Sarah E. Bouchard, Esq.
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Philadelphia, Pennsylvania

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For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED SUMMARY DECISION AND ORDER DISMISSING COMPLAINT[1]

This case arises out of a complaint of discrimination filed by Adriana Koeck ("Complainant") against General Electric Company ("Respondent") pursuant to the employee protection provisions of § 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 ("the Act"), and the implementing regulations at 29 C.F.R. §1980.[2] The Act prohibits publicly traded companies

[1] Citations to the record of this proceeding will be abbreviated as follows: CX – Proposed Complainant's Exhibit; and RX – Proposed Respondent's Exhibit.

[2] Congress has also stated that the Act is to be governed by 49 U.S.C. § 42121(b), the procedural provisions governing the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. 18 U.S.C. §1514A(b)(2)(B).

from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer, a federal agency, or Congress information relating to alleged violations of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission ("SEC"), or any provision of federal law relating to fraud against shareholders. The Act extends such protection to employees[3] of any company "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 780(d)) . . . ."

On April 23, 2007, Complainant filed her complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA"). On June 25, 2007, the Regional Administrator for OSHA dismissed the complaint as untimely. On July 24, 2007, Complainant requested a hearing before this Office regarding the complaint's dismissal. Both parties have filed motions for summary decision. Respondent argues that Complainant filed her complaint after the expiration of the statute of limitations and therefore urges dismissal. Complainant seeks a ruling that her complaint was timely filed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary decision is appropriate when there is no genuine issue as to any material fact and one party is entitled to summary decision as a matter of law. *See* 29 C.F.R. § 18.40(d) (2006). Since I am resolving this case on Respondent's cross-motion for summary decision against Complainant, I must draw all reasonable inferences in a manner most favorable to Complainant. *See id.*; Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The parties' submissions clearly reveal disagreements about the details of the events leading up to Complainant's termination. However, the parties do not dispute the content, context, and receipt dates of documents that establish Complainant's filing as untimely. Even accepting Complainant's alleged version of the facts as true, I find her complaint untimely.

On January 3, 2006, Complainant began her employment as an attorney with Respondent's Consumer and Industrial Division in Louisville, Kentucky (*Declaration of Complainant Adriana Koeck* – hereinafter "CX 1" – at 2). Initially, Complainant served as Respondent's Lead Counsel for Latin America, Commercial Law Counsel, and Legal Coordinator for General Electric Multilin, Respondent's Canadian division (*id.*). Complainant also temporarily served as Southern South American Legal Counsel during the position's six-month vacancy (*id.*).

The Consumer and Industrial Division's Legal Counsel, Raymond Burse, supervised Complainant from the time of her hiring until her termination (*see id.* at 3). Complainant's working relationship with Mr. Burse deteriorated considerably over time. As early as June 26, 2006, Complainant sought advice regarding obtaining a transfer out of Respondent's Consumer and Industrial Division (*id.* at 7). While she pursued several leads and sought advice on transferring to other GE divisions from numerous internal contacts, Complainant was unsuccessful in her efforts throughout the remainder of her tenure with Respondent. On October

[3] "Employees" include those individuals both currently and formerly working for a company. 29 C.F.R. § 1980.101.

6, 2006, Mr. Burse gave Claimant an unscheduled and unfavorable performance review (*id.* at 11). On October 24, 2006, Complainant met with Delores Harris, the Human Resources Manager for the Division's legal department, to discuss the performance review and the process for securing a transfer (*id.* at 12). Ms. Harris agreed to speak with Mr. Burse about Complainant's job performance (*id.* at 13). On October 25, 2006, Mr. Burse removed Complainant's subordinates from her supervision, changed her job title, and altered her job responsibilities (*id.*). On November 13, 2006, Ms. Harris's supervisor, Jeff Barnes, informed her that Mr. Burse no longer wanted Complainant on his team and would not support Complainant's transfer to another GE department (*id.* at 14). Mr. Barnes further observed that "it would be difficult for [Complainant] to transfer" without Mr. Burse's cooperation (*id.*).

In mid-November 2006, Complainant met again with Ms. Harris to discuss Mr. Burse's opposition to her transferring to another division within Respondent (*id.*). Ms. Harris cautioned that transferring would require a "360 review" and a performance plan, the preparation of which would require Mr. Burse's participation (*id.*). Ms. Harris believed that transferring would be an "uphill battle" because Mr. Burse "would make it very difficult for" her (*id.* at 15). Despite this, Complainant insisted on seeking a transfer, and Ms. Harris agreed to meet again after Mr. Burse supplied a performance plan (*id.*). Complainant next met with Ms. Harris on November 29, 2006 (*id.* at 16). During this meeting, Complainant gave Ms. Harris a copy of a complaint that she had filed with Respondent's corporate ombudsman earlier that day (*id.*). In the complaint, Complainant alleged whistleblower retaliation and ethnic discrimination (*id.*). According to the Complainant, Ms. Harris then abruptly ended the meeting, claiming that she needed to speak with someone about the complaint before discussing the performance plan (*id.* at 17). At one of these meetings, Ms. Harris also offered Complainant a separation settlement, which she declined (*Complaint* at 11).

On December 11, 2006, Complainant met with Mark Nordstrom, Respondent's Senior Labor and Employment Counsel, to discuss the whistleblower complaint (CX 1, at 17). Mr. Nordstrom made several statements indicating that his investigation would have no impact on her job's status (*id.*). Immediately after the meeting, Complainant sought treatment at Respondent's medical clinic for cardiac arrhythmia (*id.*). Mr. Nordstrom then told her he was placing her on medical leave until he completed his investigation (*id.*). While convalescing, Complainant received a holiday letter and gift from Mr. Burse (*id.*; *see* CX 1, attachment 12). In the letter, Mr. Burse thanked Complainant for, *inter alia*, her "super effort and great performance" (CX 1, attachment 12). During the first week of January, 2007, Complainant received a phone call at her home from Ken Southall, Senior Intellectual Property Counsel for Respondent's Consumer & Industrial Division (CX 1, at 18). Mr. Southall told her that he had spoken with Mr. Nordstrom and that "things were not looking well for Mr. Burse in the investigation" (*id.*). On January 9, 2007, Complainant corresponded over e-mail and the telephone with Mauricio Khouri, one of Complainant's former subordinates (*id.*). He told her that he had spoken with Mr. Nordstrom regarding the allegations contained in her ombudsman complaint, that "Mr. Nordstrom acknowledged everything [Complainant] had said," and that Complainant "should have a smooth transition to another GE business" (*id.*).

On January 18, 2007, Complainant received a letter from Mr. Nordstrom and Jeffrey Eglash detailing their investigation's findings (*id.*). The authors generally found both allegations

meritless (CX 1, attachment 13).[4] They noted that the investigation uncovered "widespread dissatisfaction with [Complainant's] job performance," which provided "ample justification for [Respondent] to take employment action" (*id.*). In a paragraph titled "Plans for Termination based on Performance," they noted that "the predominant view that emerged from interviews was that [Complainant] lacked depth in commercial law, reliability, and follow-through, and that [she was] unable to forge meaningful and constructive relationships or work well as part of the C&I legal team" (*id.*). In refuting Complainant's allegations of ethnic discrimination, the authors found the evidence "insufficient to support [her] claim that [her] *planned separation* was motivated by [her] Latin American heritage" (*id.*) (emphasis added). In their "Conclusion" section, Messieurs Nordstrom and Eglash wrote that they "do not see a nexus between [the intemperate and insensitive] remarks and *the plan to separate* [Complainant] from GE for stated verified performance reasons" (*id.*) (emphasis added). They ended the letter by informing Complainant that she could "expect to be contacted by C&I Human Resources in the next several days" (*id.*).

Apparently on that same day, Complainant, shocked and surprised by the letter, called Mr. Nordstrom, who told her that "his only role was to conduct the investigation of [her] complaint, and that [she] should consider herself in the same position [she] was on November 29, 2006, when [she] made the complaint" (CX 1, at 18). When asked why he had decided to terminate her employment, Mr. Nordstrom replied that it was "never" his decision to fire her (*id.* at 19). Mr. Nordstrom informed her that "he was not involved in the decision" and that he was not in a position to fire Complainant anyway (*id.*). Mr. Nordstrom then told her that Ms. Harris would contact her to discuss the matter further (*id.*).

On January 24, 2007, Ms. Harris called Complainant at home. Ms. Harris instructed her "to return to the office the next day to begin transitioning [her] duties to other attorneys" (*id.*). Ms. Harris also instructed her to bring any of Respondent's property she possessed with her (*id.*). Complainant asked Ms. Harris whether she was being terminated but received no direct answer (*id.*). Complainant memorialized the conversation in a contemporaneous e-mail, which contained the following: "I assume after Friday, I will be fired. Is this correct?" (CX 1, attachment 14).

On January 25, 2007, Complainant returned to work in accordance with Ms. Harris's instructions (CX 1, at 19). During a meeting, Complainant received two letters from Ms. Harris, both of which she had never previously seen (*id.*). One letter, dated January 24, 2007, references the other, which is dated November 29, 2006 (*id.*). In the January letter, Ms. Harris wrote, "As the attached letter indicates we were scheduled to have a final discussion on your employment status on November 29, 2006. Pursuant to our discussion today, your employment with GE will be terminated. You will be removed from payroll effective January 26, 2007" (CX 1, attachment 15). In the attached November letter, Ms. Harris wrote, "As we have discussed, we are disappointed that your job performance has not been up to the level we expected from an attorney with the background and experience you indicated you had when you were hired. Pursuant to our discussion today, your employment with GE will end effective December 8,

[4] Although the investigation revealed that another employee made "intemperate and inappropriate remarks about persons of Latin American heritage" and behaved rudely toward Complainant, Mr. Nordstrom and Mr. Eglash "found no evidence that [Complainant has] suffered discrimination on account of ethnicity" (CX 1, attachment 13).

2006. You will be removed from payroll on that date" (EX E). Attached to and referenced in both of the letters were separation and release agreements that Complainant could elect to sign to receive additional severance compensation (*id.*; CX 1, attachment 15).

Complainant asked Ms. Harris why she had not received the November letter earlier and reminded her that they had planned to discuss her performance plan and transfer request (CX 1, at 19). Ms. Harris responded that Mr. Burse had simply told her to give Complainant the letter, adding that, with the ombudsman's investigation completed, she no longer had the opportunity to transfer to another GE business (*id.*).

Discussion

The Act provides complainants 90 days "after the date on which the violation occurs" to file their claim with OSHA. 18 U.S.C. § 1514A(b)(2) (2006). The implementing regulations explain that the limitations period begins "when the discriminatory decision has been both made and communicated" to Complainant. 29 C.F.R. § 1980.103 (2006). In its commentary, the Department of Labor added that the period commences "once the employee is aware or reasonably should be aware of the employer's decision" to take discriminatory action. Procedures for Handling SOX Discrimination Complaints, 69 Fed. Reg. 52,104, 52,106 (Aug. 24, 2004) (citing *EEOC v. United Parcel Serv.*, 249 F.3d 557, 561-62 (6th Cir. 2001)).

The Administrative Review Board ("the Board") has held that "[t]he date an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of a violation, rather than the date the employee experiences the consequences" of that decision. *Halpern v. XL Capital, Ltd.*, ARB Case No. 04-120, slip op. at 3 (ARB Aug. 31, 2005). Furthermore, the Board has held that the statute of limitations begins to run on "the date an employee receives 'final, definitive, and unequivocal notice' of an adverse employment decision." *Id.* (citing *Jenkins v. EPA*, ARB No. 98-146, slip op. at 14 (ARB Feb. 28, 2003)). The Board defines "final" and "definitive" notice as a "communication that is decisive or conclusive, *i.e.*, leaving no further chance for action, discussion, or change." *Id.* Similarly, "unequivocal" means notice lacking ambiguity. *Id.* (citing *Larry v. Detroit Edison Co.*, 86-ERA-32, slip op. at 14 (Sec'y June 28, 1991)).

In the instant case, the statute of limitations began to run not later than January 18, 2007. On January 18, 2007, Complainant received the letter from Messieurs Nordstrom and Eglash containing the findings of their investigation into Complainant's ombudsman complaint. The letter referred to the authors' uncovering "ample justification" for Respondent to take "employment action" against Complainant (CX 1, attachment 13). In a paragraph titled "Plans for Termination based on Performance," the authors even described Complainant's performance issues (*id.*). Regarding her claims of ethnic discrimination, the authors found the evidence "insufficient to support [her] claim that [her] *planned separation* was motivated by [her] Latin American heritage" (*id.*) (emphasis added). In their "Conclusion" section, Messieurs Nordstrom and Eglash stated they found no nexus between certain ethnic remarks another employee made to Complainant and "*the plan to separate* [Complainant] from GE for stated verified performance reasons" (*id.*) (emphasis added). The letter ultimately advised Complainant to "expect to be contacted by C&I Human Resources in the next several days" (*id.*).

A reasonable person receiving this letter would have known that Respondent had decided to terminate her. The repeated references to Complainant's "planned separation" resolve any ambiguity that might have resulted from considering only one of these references in a vacuum. In fact, Complainant understood from this letter that a decision to terminate her employment had been made, for shortly after receiving this letter, she called Mr. Nordstrom and asked him why he had decided to terminate her employment (CX 1, at 18). Mr. Nordstrom replied that it was never his decision to fire her (*id*. at 19). He added that "he was not involved in the decision" and that he was not in a position to fire Complainant anyway (*id.*). Significantly, Complainant does not contend that he indicated during this conversation that her belief that she was being terminated was incorrect.

Complainant contends that the January 18, 2007, letter and subsequent conversation with one of its authors did not constitute notice of Respondent's intent to terminate her. First, she argues that the letter's references are inconsistent and therefore not definitive. But, as discussed above, the letter's repeated references to her separation from respondent's employ left no doubt that the decision to terminate her employment had been made.

Second, Complainant argues that the letter "was a shocking shift in GEC&I's long chain of reassurances to" Complainant and that, accordingly, she reasonably believed the termination references were inaccurate. It is true that several GE employees had corresponded with her regarding a transfer prior to January 18, 2007. Indeed, some were even hopeful and positive. Regardless, Complainant knew that her immediate supervisor neither wanted her on his team nor supported her transfer.[5] Further, in her April 23, 2007, complaint, Complainant acknowledged that Mr. Burse "was positioning her to be the one let go in a reduction in force" and admitted that, in mid-November 2006, Ms. Harris offered her a severance package (*Complaint* at 11). Under these circumstances, Complainant could not have been surprised that a decision to terminate her had been made. Third, Complainant unpersuasively argues that the telephone conversation with Mr. Nordstrom confirmed her skepticism about the accuracy of the letter's references to her planned termination. Nothing in her account of the conversation could have cast doubt on the accuracy of the references to her termination. Rather, Mr. Nordstrom simply emphasized that he did not participate in the decision to terminate her.

Complainant filed her complaint on April 23, 2007. For her complaint to be considered timely, Respondent must have communicated its alleged discriminatory decision to terminate Complainant no earlier than January 23, 2007. Since I have found that the alleged communication occurred by January 18, 2007, at the latest, the complaint was not timely filed. Accordingly, the complaint must be dismissed.

[5] Against the backdrop of their otherwise disastrous working relationship, Mr. Burse's holiday note and gift could not have permitted a contrary belief.

ORDER

IT IS ORDERED that the complaint is **DISMISSED**.

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JEFFREY TURECK
Administrative Law Judge

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).