U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 26 July 2007

CASE NO. 2007-SOX-0015

In the Matter of:

RANDALL PITTMAN,
Complainant,

vs.

SIEMENS AG,
SIEMENS MEDICAL SOLUTIONS,
DIAGNOSTIC PRODUCTS CORPORATION,
SEYFARTH SHAW, LLP,
DAVID J. ROWLAND, and
ERICH R. REINHARDT,
Respondents.

DECISION AND ORDER DISMISSING COMPLAINT AND DENYING REQUEST FOR ATTORNEY'S FEES

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.

PROCEDURAL BACKGROUND

It is undisputed that Complainant was terminated from his employment with Siemens Medical Solutions Diagnostics ("SMSD"), formerly Diagnostic Products Corporation ("DPC"), on January 12, 2005. RM at 2; CR at 2.

On October 4, 2005, Complainant filed a complaint ("SOX I") against Respondent DPC under SOX with the Secretary of Labor. On November 3, 2005, the Occupational Safety and Health Administration ("OSHA") investigated and dismissed the complaint for untimeliness. Complainant initially requested a hearing before the Office of Administrative Judges ("OALJ"), but later withdrew his complaint on January 19, 2006.

On December 4, 2005, Complainant filed a second SOX complaint ("SOX II") against DPC, Michael Ziering, Ira Ziering, Sid Aroesty, Chris Goss, and Seyfarth Shaw LLP. Complainant alleged that DPC took certain adverse employment actions against him after his termination. OSHA dismissed Complainant's claim as untimely, and Complainant requested a hearing with the OALJ. On March 6, 2006, Administrative Law Judge Alexander Karst

dismissed the complaint as untimely. Complainant appealed to the Administrative Review Board ("ARB"), where the case is currently pending.

On April 26, 2006, Complainant filed a 29-count complaint in California state court against DPC, Sid Aroesty, Fritz Backus, Anna Bermea, Chris Goss, Ava Sedgwick, Ira Ziering, and Does 1-10. RX F. The 29 claims alleged were related to wrongful termination, employment discrimination, and harassment. RX F. One such claim was that Complainant was defamed by a memorandum written by DPC's general counsel at the time, Fritz W. Backus ("Backus Memo") that was sent to some of DPC's employees. RM at 4. On August 14, 2006, DPC and Fritz Backus filed an anti-SLAPP motion[1] against the defamation claim and all claims related to the Backus Memo. RM at 4. On September 11, 2006, the court granted the anti-SLAPP motion, struck the defamation claim and related claims from the complaint, and awarded the defendants, attorney's fees in the amount of $1,600. RX I.

On August 7, 2006, Complainant filed the current SOX complaint ("SOX III" or "CC") with OSHA. On December 18, 2006, OSHA dismissed the complaint because one claim was untimely and the remaining claims did not allege actions that were materially adverse. On December 26, 2006, Complainant requested a hearing before the OALJ.

On February 26, 2007, Complainant filed a motion to stay proceedings pending the ARB's ruling on his SOX II complaint. On February 28, 2007, I ordered Respondents to show cause why Complainant's motion to stay proceedings should not be granted. On March 6, 2007, Respondents filed an opposition to Complainant's motion to stay proceedings.

Also on March 6, 2007, Respondents filed a motion for summary judgment ("Respondents' motion" or "RM") with attached exhibits ("RX").

On March 7, 2007, Complainant filed a motion to withdraw his objections to the Secretary's findings on his current complaint. On March 9, 2007, I issued a notice taking the case off calendar, and an order requiring Complainant to show cause why the case should not be dismissed with prejudice based on his motion to withdraw his objections. On March 19, 2007, Complainant filed an objection to Respondents' motion for summary judgment and reasserted his objections to the Secretary's findings. Complainant also repeated his request that this matter be stayed and requested that he be given an opportunity to respond to Respondents' motion for summary judgment.

On March 26, 2007, I issued an order denying Complainant's motion to stay proceedings as inappropriate and inefficient. I also issued an order requiring Complainant to show cause why Respondents' motion for summary judgment should not be granted. On April 6, 2007, Complainant filed an opposition to Respondents' motion for summary judgment ("Complainant's response" or "CR") with attached exhibits ("CX"). On April 20, 2007, Respondents filed their reply ("Respondents' reply" or "RR").

---

[1] An anti-SLAPP motion is a special motion to strike a strategic lawsuit against public participation. CAL. CIV. PROC. CODE § 425.16 (Deering 2007). Such lawsuits are brought primarily to chill the valid exercise of a "person's right of petition or free speech under the United States or California Constitution in connection with a public issue." § 425.16.

SUMMARY OF DECISION

I find that Complainant's complaint must be dismissed with prejudice for a number of reasons. First, Complainant does not demonstrate that any of the Respondents are subject to the Act. Second, Complainant's claims of wrongful termination, blacklisting, failure to mediate wage-and-hour disputes, slander, and hostile work environment are all barred by the 90-day statute of limitations set forth in SOX at 18 U.S.C. § 1541A(b). Third, Complainant's second claim of slander and his anti-SLAPP claim are not covered by the Act. Therefore, the complaint must be dismissed with prejudice.

I also find that Respondents' request for attorney's fees must be denied. Complainant's claims do not rise to the level of frivolousness necessary to justify an award of attorney's fees.

ANALYSIS

COVERAGE

The whistleblower protection provisions of section 806 state that covered employers and individuals may not retaliate against employees who provide information and assist in investigations related to violations of listed laws and Securities and Exchange Commission (SEC) rules and regulations. Covered entities under the provisions include any

> "company 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. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company." (codified at 18 U.S.C. § 1514A(a)).

Complainant brings his SOX III complaint against: 1) Siemens AG; 2) Erich Reinhardt; 3) Siemens Medical Solutions Diagnostics ("SMSD"); 4) Diagnostics Products Corporation ("DPC"); 5) Seyfarth Shaw LLP ("Seyfarth"); and 6) David Rowland. Complainant alleges that all Respondents had knowledge of his protected activity and participated in adverse acts against him. CR at 14. Complainant also contends that DPC was controlled by Siemens AG's Board of Directors from July 2006 until January of 2007. CR at 13-14.

Respondent Siemens AG qualifies as a publicly traded German corporation under SOX. RM at 5. However, Siemens AG is not covered under the Act because it did not employ Complainant, and Complainant has not shown sufficient commonality of management and purpose between Siemens AG and DPC to justify piercing the corporate veil. *See Bothwell v. American Income Life,* 2005-SOX-57 at 8 (ALJ) (Sept. 19, 2005); *Dawkins v. Shell Chemical, LP*, 2005-SOX-41 (ALJ)(May 16, 2005); *Gonzales v. Colonial Bank & The Colonial Bancgroup, Inc*., 2004-SOX-39 (ALJ)(Aug. 20, 2004).

Respondent Erich Reinhardt is a board member of Siemens AG and the chairman of Siemens Medical Solutions USA Inc.'s ("SMSU") board of directors. Dr. Reinhardt does not

qualify as an officer, employee, contractor, subcontractor, or agent of a covered entity, because neither Siemens AG nor SMSU is covered by the Act.

Respondent SMSD is a non-public subsidiary of SMSU. RM at 5. Respondent DPC changed its name to SMSD on November 14, 2006, and will hereafter be referred to as DPC/SMSD. RM at 1. Respondent DPC/SMSD is not subject to the Act because it is not a publicly traded company.

Respondent Seyfarth is a law firm that represents all Respondents. Seyfarth is not subject to the Act because it did not employ Complainant and because it is not a publicly traded company.

Respondent David Rowland is a managing partner of Seyfarth's Chicago office. RM at 6. Respondent David Rowland is not subject to the Act because he is not an officer, employee, contractor, subcontractor, or agent of a covered entity.

I find that none of the named Respondents are covered under SOX. However, assuming *arguendo* that they were, I find that Complainant's allegations are all either untimely, not covered under the Act, or both.

ALLEGED ADVERSE ACTIONS

Complainant alleges Respondents retaliated against him for engaging in protected activity under the Act. Complainant alleges several adverse employment actions. In my analysis below, I find that these actions are either untimely filed, not legally "adverse," or both.

Under section 806 of SOX, a covered employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee." 18 U.S.C. 1541A (a). In *Harvey v. Home Depot, Inc.*, the ALJ stated that with the exception of blacklisting and interfering with a complainant's subsequent employment, SOX merely protects an employee from retaliation for his protected activities while the complainant is an employee of the respondent. 2004-SOX-36, at 4 (ALJ)(May 28, 2004). I agree with this standard, as it reflects the language of the statute.

Additionally, 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.

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). However, Complainant bears the burden of justifying the application of these doctrines, and he has raised neither arguments nor facts in support. I therefore find that neither of these doctrines applies in this case.

1) *Hostile Work Environment*

Complainant alleges that Respondents first subjected him to a hostile work environment in September 2004 and that this environment continues today because he still seeks reinstatement. CR at 13.

The latest date that Complainant could have been subjected to a hostile work environment was on the last day of his employment, January 12, 2005. Since this claim was filed over a year and half after January 12, 2005, it is untimely.

2) *Wrongful Termination*

Complainant alleges that Respondent DPC/SMSD wrongfully terminated him on January 12, 2005. CR at 2. Complainant concedes that he was made aware of this alleged adverse action on January 12, 2005. CR at 2. However, Complainant's complaint was not filed until August 7, 2006, which is well past the 90-day statute of limitations. Thus, Complainant's claim is untimely.

3) *Blacklisting*

To prove blacklisting, a complainant must show evidence that a specific act of blacklisting occurred. *Pickett v. Tennessee Valley Auth.,* ARB Case Nos. 00-56, 00-59, slip op. at 9 (Nov. 28, 2003). "Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place." *Id.*

a. Negative Write-up

Complainant alleges that Respondents placed a negative write-up in his file in September 2004 after he complained about discrimination and overtime violations. CR at 10. He claims that he has not been rehired due to this write-up and that each day it remains in his file triggers a new statute of limitations. CR at 11.

First, Complainant does not provide any support for his assertion that a negative write-up was placed in his personnel file. Second, even if I were to assume that DPC/SMSD placed a negative write-up in Complainant's personnel file and that that act amounted to an adverse action, this claim is still untimely. Complainant alleges that the write-up was placed in his file in September 2004. Complainant did not file his complaint until August 2006, almost 2 years after the alleged adverse action.

In addition, Complainant failed to provide any evidence of any specific acts of blacklisting or refusal to rehire resulting from this alleged write-up.

b. Eastridge Group

Complainant alleges that he was denied employment with a potential employer, the Eastridge Group, after they reviewed a memo written by DPC/SMSD's general counsel ("Backus Memo"). CC at 9. The Backus Memo was sent to DPC/SMSD employees by DPC/SMSD's general counsel on September 23, 2005. RM at 4. Complainant interviewed with the Eastridge Group on April 4, 2006, and admits that he sent them a copy of the memo on April 11, 2006 in order to "diffuse the bad reference that SMSD was disseminating." CR at 8-9. Complainant claims he never heard back from the Eastridge Group and that he missed out on a number of job opportunities with the Eastridge Group after May 8, 2006 because of the memo. CR at 9.

Except for a vague mention of a negative reference DPC/SMSD was disseminating, Complainant has failed to allege any specific acts of blacklisting by Respondents that caused the Eastridge Group to not hire him. Respondents cannot be held liable for Complainant's own distribution of the memo to the Eastridge Group on April 11, 2006. Thus, the only action that Complainant alleges Respondents took in connection with the memo was its original circulation to DPC/SMSD employees on September 23, 2005. Since Complainant did not file his complaint until August 7, 2006, this claim is untimely.

c. Termination by Manatt

Complainant alleges that his employment at the law firm of Manatt, Phelps & Phillips ("Manatt") was terminated due in part to a bad reference from Respondent Siemens. CR at 10. Complainant was hired by Manatt on June 19, 2006, and was later fired by Manatt on October 16, 2006. CR at 10.

First, Complainant provides no evidence that Respondents contacted Manatt and supplied them with a negative reference during his employment. Second, Complainant first raised this claim in his opposition to Respondents' motion for summary judgment on April 6, 2007. Even if Complainant was terminated due to a bad reference from Respondents, he was terminated on October 16, 2006 and any alleged adverse action by Respondents would have taken place before that date. Since April 6, 2007 is well beyond the 90-day statute of limitations, this claim is untimely.

4) *Anti-SLAPP Motion*

Fourth, Complainant alleges that Respondents filed their anti-SLAPP claim against him on August 14, 2006 in an effort to threaten, harass, and intimidate him for filing this SOX claim with OSHA on August 7, 2006. CR at 11.

With the exception of blacklisting and interfering with a complainant's subsequent employment, SOX only protects an employee from retaliation for his protected activities while the complainant is an employee of respondent. *Harvey v. The Home Depot, Inc.*, 2004-SOX-36, at 4 (ALJ)(May 28, 2004). Respondents filed their anti-SLAPP motion against Complainant a year and a half after he had ceased to be an employee at DPC/SMSD. Since Complainant was

not an employee at the time of the alleged adverse act and this does not constitute blacklisting or interference with employment, this claim is not covered by the Act.

Additionally, Respondents prevailed on their anti-SLAPP claim in state court. This provides support that the filing of the anti-SLAPP claim was justified. I conclude that this claim does not qualify as an adverse employment action under SOX.

5) *Wage-and-Hour Claims*

Fifth, Complainant alleges that Respondents continued a harassment and intimidation campaign against him on August 2, 2006 when they refused to mediate his state wage-and-hour claims unless he dropped his SOX claims. CC at 5. Respondents counter that DPC/SMSD sent an e-mail to Complainant in which it first refused to mediate with him on August 16, 2005. RX N at 1.

Respondents first refused to mediate with Complainant on August 16, 2005, but then attempted to mediate with Complainant again after that date. RX N at 1. Nonetheless, the statute of limitations began when Respondents first refused to mediate his wage-and-hour claims. SOX regulations state that an alleged violation occurs "when the discriminatory decision has been both made and communicated to the Complainant." 29 C.F.R. § 1980.103. Even assuming that Respondents' refusal to mediate was retaliatory in nature, their decision was first communicated to Complainant almost one year before he filed this claim. Thus, this claim is untimely.

6) *Slander*

a. Backus Memo

Complainant first alleges that Respondents slandered him when they sent the Backus Memo to employees on September 23, 2005. CC at 7. Respondents contend that this claim was untimely filed because the Backus Memo was sent to DPC/SMSD's employees on September 23, 2005 and thus, the statute of limitations expired in December 2005. RM at 10.

Complainant's complaint was filed on August 7, 2006, which is well past the 90-day statute of limitations. Thus, Complainant's first claim of slander is untimely.

b. Work-Place Rumors

Complainant claims that on July 15, 2006 a former co-worker who was still working for DPC/SMSD contacted and informed Complainant that DPC/SMSD officers were spreading rumors that he had threatened their lives. CC at 7. He also asserts that two other employees contacted him regarding these alleged rumors. CR at 12.

First, Complainant does not present any evidence to support his claim. Complainant does not provide affidavits from the three employees who allegedly contacted him, nor does he mention them by name or provide any specifics about the phone calls. Second, Complainant also

alleges that the slanderous statements began months before he was made aware of them. CC at 8. Thus, it is likely that this alleged adverse action should be dismissed on statute of limitation grounds, but I cannot be certain without more specific information about when these statements were made.

Third, even if this claim was timely filed, it is not covered under the Act. With the exception of blacklisting and interfering with a complainant's subsequent employment, SOX only protects an employee from retaliation for his protected activities while the complainant is an employee of respondent. *Harvey v. The Home Depot, Inc.*, 2004-SOX-36, at 4 (ALJ)(May 28, 2004). The alleged slanderous statements were spread in 2006, two years after Complainant's employment had been terminated with DPC/SMSD. Since Complainant was not an employee at the time of the alleged adverse action, this claim is not covered under SOX.

ATTORNEY'S FEES

An ALJ may award a respondent attorney's fees not exceeding $1,000 when a complaint is "frivolous or brought in bad faith." 29 C.F.R. § 1980.109(b). Respondents request attorney's fees because they allege Complainant's complaint is frivolous, duplicative, and brought in bad faith. RM at 16. Although I find that Complainant brought an unmeritorious case against Respondents, I do not believe that it was completely frivolous. Complainant is pro se, and although he did not present a strong case, that "does not mean he did not have a sincere belief a legitimate claim could be brought." *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 at 51 (ALJ) (Mar. 10, 2005). On the contrary, Complainant demonstrated a deep belief in his claims. Therefore, I deny Respondents' request for attorney's fees.

CONCLUSION

Complainant's complaint must be dismissed with prejudice for a number of reasons. First, Complainant does not demonstrate that any of the Respondents are subject to the act. Second, Complainant's claims of wrongful termination, blacklisting, failure to mediate wage and hour disputes, slander, and hostile work environment all are barred by the 90-day statute of limitations set forth in SOX at 18 U.S.C. § 1541A(b). Third, Complainant's second claim of slander and his anti-SLAPP claim are not covered by the Act. Therefore, the complaint must be dismissed with prejudice.

I also find that Respondents' request for attorney's fees must be denied. Complainant's claims do not rise to the level of frivolousness necessary to justify an award of attorney's fees.

ORDER

For the reasons stated above, Complainant's complaint is hereby DISMISSED with prejudice.

IT IS SO ORDERED.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge