



Issue Date: 05 March 2008

Case No: 2007-SOX-00066

In the Matter of:

GARY SHARP,
Complainant

v.

**REPUBLIC PAPERBOARD COMPANY, LLC,
EAGLE MATERIALS, INC.,**
Respondents

BEFORE: JOSEPH E. KANE
Administrative Law Judge

**DECISION AND ORDER GRANTING COMPLAINANT'S VOLUNTARY
WITHDRAWAL OF OBJECTIONS AND HEARING REQUEST
AND DENYING RESPONDENTS' MOTION FOR ATTORNEY FEES**

This case arises out of a complaint of discrimination filed by Complainant, Gary Sharp, with the Occupational Safety & Health Administration ("OSHA") on December 29, 2006, against Respondents, Republic Paperboard Company, LLC, and Eagle Materials, Inc., pursuant to the employee protection provisions of Public Law 107-204, § 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, *et seq.* ("the Act").

This proceeding was initiated before the Office of Administrative Law Judges on June 28, 2007, when Complainant filed objections to the OSHA Administrator's dismissal of his complaint. The parties have engaged in extensive discovery, and various pre-hearing motions have been filed. On February 20, 2008, Complainant, through counsel, filed a "Motion for Voluntary Dismissal Without Prejudice." On February 25, 2008, Respondents filed a "Response to Complainant's Motion for Voluntary Dismissal and Respondents' Motion for Attorneys' Fees" addressing Complainant's dismissal and moving for attorney fees. Respondents also request a hearing on their Motion.

I. Withdrawal of Objections

Complainant requests that the dismissal be labeled "without prejudice . . . so that he may pursue his claims under Oklahoma law." Complainant argues that the Administrative Law Judge has wide discretion in shaping the language of the withdrawal, and contends that a dismissal without prejudice leaves the effect of the withdrawal to be resolved by the State Court. Respondents assert that the regulations only permit Complainant to withdraw his objections and hearing request, and that the dismissal should be "with prejudice" with respect to Complainant's

administrative action. Respondents state that they are not seeking a ruling as to whether Complainant's state law claims are prejudiced by the withdrawal, but seek an "express finding that the Secretary's findings will be final upon approval of Sharp's withdrawal and that Sharp cannot re-file a claim under Sarbanes-Oxley based on the same facts."

The procedure for dismissing a Sarbanes-Oxley whistleblower complaint is set forth at 29 C.F.R. § 1980.111(c):

At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Board. The judge or the Board, as the case may be, will determine whether to approve the withdrawal.

There is no basis in the regulations to label the withdrawal as "with prejudice" or "without prejudice," as the parties request. Complainant's withdrawal of his objections and hearing request terminates this administrative proceeding and causes the preliminary findings to become the final decision of the Secretary of Labor. The effect of Complainant's withdrawal of his objections to the Secretary's findings on his state law claims is more appropriately determined by the State Court. *See Rydberg v. Supervalue, Inc.*, ALJ Nos. 2005-SOX-27, 2005-SOX-28 (Aug. 23, 2005). Additionally, Respondents' request for an "express finding" that Sharp cannot refile "a claim under Sarbanes-Oxley based on the same facts" is inappropriate. The undersigned will not issue an advisory ruling addressing the effect of the withdrawal on a hypothetical refiling.

II. Motion for Attorney Fees

Additionally, Respondents seek an award of attorney fees. The standard for awarding attorney fees under the Act to a respondent is set forth at 29 C.F.R. § 1981.109(b):

If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding \$1,000.

The procedure for filing such a request is set forth at 1981.106(a):

Any party who desires review, including judicial review, of the findings and preliminary order, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file any objections and/or a request for a hearing on the record within 60 days of receipt of the findings and preliminary order pursuant to paragraph (b) of § 1981.105. The objection or request for attorney's fees and request for a hearing must be in writing and state whether the objection is to the findings, the preliminary order, and/or whether there should be an award of attorney's fees.

Complainant asserts that the Motion is untimely because it was not filed within 60 days of the preliminary order. Respondents reply that the rules do not contemplate a situation where the frivolous nature of a claim does not become apparent until the discovery stage before the Administrative Law Judge. Accordingly, Respondents cite 29 C.F.R. § 1980.115 as the basis for

their motion. That section permits an Administrative Law Judge to “waive any rule or issue any orders that justice or the administration of the Act requires.”

The circumstances of this case do not justify a departure from the regulatory framework or an award of attorney fees to Respondents. The undersigned does not believe that Complainant’s claim is frivolous or was brought in bad faith. The Board has held that:

[a] complaint is frivolous if it lacks an arguable basis in law or fact. A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist. A complaint lacks an arguable basis in fact if, after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless.

Reddy v. Medquist, Inc., ARB No. 04-123, ALJ No. 2004-SOX-35, Slip Op. at 9 (ARB Sep. 30, 2005) (internal citations and quotations omitted).

Respondents make various arguments attacking Complainant’s allegations, asserting that the allegations fail to establish fraud, materiality, coverage under the Act, or other elements of a *prima facie* case of discrimination. However, the whistleblower protection provisions of Sarbanes-Oxley are relatively new, and conflicting rulings have been issued both on the Administrative Law Judge and the Federal District Court levels. Many of Respondents’ arguments are based on unsettled areas of Sarbanes-Oxley, such as the scope of activity that is protected under the Act. At this stage in the proceedings, it is not at all clear that Complainant’s positions are legally incorrect, much less frivolous.

Additionally, there is no basis to conclude that the claim was factually baseless. Respondents make various arguments attacking the factual merits of Complainant’s claims; however, Respondents did not move for summary decision, pursuant to 29 C.F.R. § 18.40. Only at that point would Complainant be obligated to come forth with evidence to substantiate his claims. 29 C.F.R. § 18.40(c). At this stage, it cannot be concluded that the claim lacked a basis in fact.

Respondents also assert that Mr. Sharp certified the accuracy of various financial reports that he now claims were inaccurate as part of his claim. Respondents contend that this demonstrates that his Sarbanes-Oxley claim is groundless. In *Ciavarra v. BMC Software, Inc.*, No. 4:07-CV-00413 (S.D. Tex. Feb. 7, 2008), the Court rejected a similar “unclean hands” defense. Respondents cite no support for the proposition that a putative whistleblower’s participation in wrongful conduct nullifies his claim, much less renders it frivolous.

Respondents also point to “misleading” evidence filed by Complainant, specifically Exhibit B to his response to Respondents’ Motion to compel. Complainant acknowledges that the Exhibit is inaccurate as a result of human error in sorting data. Complainant states that this was an innocent mistake and has withdrawn the Exhibit from consideration. There is no reason to believe otherwise.

Finally, Respondents point to alleged “misconduct” on the part of Mr. Sharp in contacting Republic employees outside of the formal discovery process. Prior to Complainant’s

request to withdrawal his objections, Respondents moved for an order to compel production of documents of communications between Mr. Sharp and his attorneys relating to these allegedly improper contacts. Although this Motion is rendered moot by Complainant's withdrawal of his objections, the undersigned had an opportunity to review and consider the Motion to compel before Complainant filed the Motion to withdraw his objections.

In reviewing the Motion to compel and the communications between Mr. Sharp and his former co-workers, the undersigned concluded that Respondents' assertions of misconduct were exaggerated and unsupported by the facts. One example is Respondents' charge that Mr. Sharp "solicited a Republic manager to gain secret and unauthorized access to the Company's email system (a criminal offense under Oklahoma law) and to misappropriate and provide him with confidential Company documents." This allegation is totally unsupported by the facts, as the sender of the email, Republic Controller Jim Hollander, expressly disavowed any intention to access Republic's email system. Similarly, Mr. Sharp's other email communications are of no significance, and involve little more than Mr. Sharp telling his former co-workers about the progress of his case. Significantly, Complainant's attorneys aver that they did not advise or encourage Mr. Sharp to contact anyone, and that they have not personally contacted any current Republic employees, other than at depositions. There is no basis to conclude that Mr. Sharp engaged in any "misconduct," much less "misconduct" that would render his underlying claim "frivolous" or "in bad faith."

In conclusion, Respondents have not adequately demonstrated that Complainant's claim was "frivolous" or brought "in bad faith," to justify an award of attorney fees, much less to justify an untimely request for attorney fees under the catch-all provision of 29 C.F.R. § 1980.115.

Accordingly, it is HEREBY ORDERED that Complainant's request to withdraw his objections to the Secretary's findings is GRANTED. All pending motions, including Respondents' Motion to compel and Respondents' Motion to dismiss are DENIED as moot.

It is FURTHER ORDERED that Respondents' Motion for attorney fees and a hearing on the same is DENIED.

It is FURTHER ORDERED that the hearing in this matter scheduled on April 7, 2008, is CANCELLED.

A

JOSEPH E. KANE
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, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC, 20210. The Petition is considered filed on the date of its

postmark, facsimile transmittal, or e-mail communication; but if filed in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). The 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).