U.S. Department of Labor

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Issue Date: 16 April 2007

CASE NO.: 2007-SOX-18

IN THE MATTER OF

MARY CATHERINE SNEED,
Complainant

vs.

RADIO ONE, INC.,
Respondent.

RECOMMENDED DECISION AND ORDER ON RESPONDENT'S MOTION FOR SUMMARY DECISION

Procedural Status

This matter involves a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (the Act)[1] and regulations promulgated pursuant thereto[2] brought by Mary Catherine Sneed (Complainant) against Radio One, Inc. (Respondent).

Complainant filed her initial complaint with OSHA on 28 Sep 06. The matter was investigated and a report was issued. Complainant filed objections and requested a formal hearing. Following the initial scheduling order, Respondent filed a motion for summary decision, requesting the complaint be dismissed as untimely. Complainant filed her answer in opposition and Respondent filed a reply.[3]

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[1] 18 U.S.C. § 1514A *et. seq*.
[2] 29 C.F.R. Part 1980.
[3] During a 3 Apr 07 conference call with counsel for both sides, Complainant's Counsel asked for leave to file a possible supplemental brief addressing equitable relief. Respondent objected, but in the interest of ensuring a full and complete record before dismissing the complaint without a hearing, leave was granted. However, the supplemental brief Complainant filed had nothing to do with any equitable principles which might excuse her failure to file and instead simply extended her argument that there was no "final, definitive, and unequivocal notice" of an adverse employment decision until 30 Jun 06. Her supplemental brief was nonetheless considered.

Applicable Law

Under the Act and applicable regulations, a complainant must file her complaint "[w]ithin 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant)..."[4]

The violation occurs when the employer communicates to the employee its intent to implement an adverse employment decision, rather than the date the employee experiences the consequences.[5] Statutes of limitations in whistleblower acts run from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision. "Final" and "definitive" notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. "Unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities.[6]

The regulations incorporate by reference procedural rules for hearings conducted under the Act. "Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges codified at subpart A, part 18 of title 29 of the Code of Federal Regulations."[7]

Parties are allowed to seek a summary decision without a full hearing.[8] They are entitled to a summary decision if:

> the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.[9]
>
> Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response

[4] 29 C.F.R. § 1980.103(d); 18 U.S.C. §1514A(b)(2)(D).
[5] *Halpern v. XL Capital, LTD.*, 2004 SOX 54 (ARB) (Aug. 31, 2005), (c*iting Overall v. Tennessee Valley Auth.*, 97-ERA-53 (ARB) (Apr. 30, 2001); *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)).
[6] *Id.,(citing Jenkins v. United States Envtl. Prot. Agency*, 1988-SWD-2 (ARB) (Feb. 28, 2003); *Larry v. The Detroit Edison Co.*, 86-ERA-32 (Sec'y) (Jun 28, 1991)).
[7] 29 C.F.R. § 1980.107(a).
[8] 29 C.F.R. § 18.40.
[9] 29 C.F.R. §§ 18.40(d), 18.41(a).

must set forth specific facts showing that there is a genuine issue of fact for the hearing.[10]

The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[11] In a motion for summary disposition, the moving party has the burden of establishing the "absence of evidence to support the nonmoving party's case."[12] While all of the evidence must be viewed in the light most favorable to the nonmoving party, the mere existence of some evidence in support of the non-moving party's position is insufficient; there must be evidence on which the fact finder could reasonably find for the non-moving party.[13]

Discussion

The parties appear to agree that Complainant filed her complaint with OSHA on 28 Sep 06, which is the 90th day for any adverse action taken on 30 Jun 06 and the 91st day for any adverse action taken on 29 Jun 06. Accordingly, the key determination is whether the filing period began on 29 or 30 Jun 06.

Respondent argues that the adverse action triggering the running of the 90-day clock was the notification to Complainant on 29 Jun 06 that her employment would be terminated on 30 Jun 06. Complainant responds that her communications with Respondent were not definitive and Respondent did not unequivocally inform her that she would be fired as of 30 Jun 06 or any other specific date. Complainant maintains that it was not until the next day (30 Jun 06) that it became clear that she was terminated. Complainant argues the clock does not start until a date certain for a planned adverse action is communicated to the employee. Respondent answers that even though Complainant was told in clear terms on 29 Jun 06 that she would be terminated on 30 Jun 06, the law does not require a date certain, as long as the intent to take adverse action is not equivocal.

In her opposition, Complainant moved to strike the affidavit of Alfred Liggins III, Respondent's CEO, as failing to declare that the "foregoing" statements are true and correct under penalty of perjury. Instead, the affidavit begins with that language. I do not find the fact that the subject language is in the beginning rather the end of the affidavit removes it from the "substantial" compliance required by the Act and deny the motion to strike. [14]

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[10] 29 C.F.R. § 18.40(c).
[11] *Moldauer v. Canandaigua Wine Co.*, 2003-SOX-26 (ARB) (Dec. 30, 2005).
[12] *Wise v. E.I. DuPont De Nemours and Co., 58 F.3d 193* (5th Cir. 1995).
[13] *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).
[14] 28 U.S.C. § 1746 (given the state of the evidence, had I granted the motion, my ultimate ruling would have remained the same).

The communications between the parties relevant to the issue of unequivocal notice consist of a conversation between Complainant and Mr. Liggins on 29 Jun 06 and their subsequent e-mails on 29 and 30 Jun 06.

In her declaration, Complainant recounts that the 29 Jun 06 conversation included a discussion of her separation in general terms, a broad suggestion by Respondent that she continue on in a consulting capacity, a proposal of a severance package that she rejected, and an indication that Respondent was interested in continuing to discuss her termination on an ongoing basis. She states there was no indication that her last day of work was to be 30 Jun 06 and the exchange was genial, indicating Respondent was willing to negotiate and work with her.

Mr. Liggins, on the other hand, states that he terminated her employment on 29 Jun 06 and that her departure would be announced on 30 Jun 06.

The e-mails on 29 and 30 Jun 06 constitute the remaining relevant communications between Respondent and Complainant. [15]

On 29 Jun 06, Complainant received an e-mail that set forth the "game plan" for Complainant's termination. It informed Complainant that she would receive a termination letter and severance offer. It stated that 30 Jun 06 would be her last day and announcements to that effect would be made. It anticipates that she would reject the severance package and make a counteroffer. It mentions the possibility of Complainant doing consulting work for Respondent and asks her to call back to make sure they "are on the same page."

Complainant's e-mail on 29 Jun 06, answered that the game plan "sounds good but needs to be mutual." She suggested talking before noon and noted that she had her own press release ready and was prepared to file a lawsuit in the afternoon. In her declaration, Complainant maintains that at that point, they were negotiating and she did not consider that the decision to terminate was final or that a termination date was established.

Respondent's first e-mail to Complainant on 30 Jun 06, stated Respondent will move forward with the plan and attached the termination letter and proposed severance agreement. Complainant responded by e-mail that she could not open the severance package file and asked Respondent to delay making announcements until she could. She also noted she could not clean out her office until Tuesday evening. Respondent replied that it had already made some notifications. In her declaration, Complainant states that it was not until this e-mail exchange that she understood 30 Jun 06 to be her last date of employment.

[15] As submitted by Complainant with her declaration.

Based on that record, Respondent argues that there is no genuine issue of material fact that Complainant was informed on 29 Jun 06 that she would be terminated on 30 Jun 06. Respondent argues that even if the Court were to find a genuine issue of material fact as to whether there was an unequivocal communication on 30 Jun 06 as a date certain for her termination, such a certain date is not required, as long as notice of an unequivocal decision to terminate was communicated.

While Complainant aptly points out that in *Chardon* there was a certain date for termination; the holding of that case is not that a certain date is required, but that a notification of termination to be executed on a future certain date is sufficient to trigger the running of the filing time limit.[16] Similarly, *Delaware State* holds that the clock starts at a communicated decision to deny tenure, even if the denial ultimately results in a subsequent termination and the decision to deny tenure is subject to a grievance proceeding or other collateral review.[17] Finally, while the district court opinion cited by Complainant[18] involves a case in which the plaintiff was informed by his supervisor that the supervisor intended to demote him, the opinion questions whether or not the supervisor had the authority to make such a decision, citing evidence in the record that the plaintiff did not believe he did.

Likewise, while Respondent accurately observes that there is no case law holding that the statute begins to run only upon the establishment of a specific date, no case law specifically holds that a certain date is not required.

The standard set forth by case law is that for the clock to start, the complainant must have received final, definitive, and unequivocal notice of an adverse employment decision. That standard must by definition be an objective one, based not on what the complainant subjectively thought, but rather what a reasonable person in her position would have understood.[19]

Complainant's declaration might be enough to establish a genuine issue of fact as to whether she subjectively comprehended that the communications between her and Respondent on 29 Jun 06 constituted a final, definitive, and unequivocal notice that she had a termination date of 30 Jun 06. However, the language of the e-mails[20] exchanged on 29 Jun 06 leaves no reasonable objective conclusion other than that Complainant was to be terminated as of 30 Jun 06. In spite of what may have been some subjective confusion on Complainant's part, there is no genuine issue of material fact that the clear objective interpretation of any future negotiation or discussion of the "game plan,"

[16] *See Chardon*, 454 U.S. 6.
[17] *See Delaware State*, 449 U.S. 250.
[18] *Snapp v Dominguez*, No. 1:01-CV-367-BMM (N.D. Ga. 2003).
[19] *See, e.g.*, *E.E.O.C. v. United Parcel Service, Inc.*, 249 F.3d 557, 562 (6th Cir. 2001) ("[o]nce the employee is aware or reasonably should be aware of the employer's decision, the limitations period commences").
[20] Respondent: "Tomorrow will be your last day . . . since it is a long holiday weekend, you can gather your personal stuff." Complainant: "That sounds good . . ."

related not to whether Complainant would continue to be employed by Respondent after 30 Jun 06, but to the terms of the severance package and the timing of the public announcements. Moreover, the follow-on communications on 30 Jun 06 indicate no surprise by Complainant at the fact that Respondent considered Complainant to have been terminated on that date.

However, even assuming *arguendo* that there was a genuine issue of material fact as to whether Complainant reasonably should have understood on 29 Jun 06 that Respondent had notified her of a 30 Jun 06 date certain for her termination, the outcome would be the same. There is no genuine issue of material fact that Complainant was objectively on notice that her termination was not in question and was imminent. There is no genuine issue of material fact that the totality of the circumstances establish that, through the communications on 29 Jun 06, Complainant received final, definitive, and unequivocal notice of a decision to terminate her, even if the severance package and timing was to be determined.

Consequently, 29 Jun 06 is the date upon which the 90-day filing period began. It expired on 27 Sep 06. Complainant makes no argument that any equitable relief applies and the record contains no grounds for the consideration of such.[21]

Complainant's filing was untimely and her complaint is **dismissed**.

IT IS FURTHER ORDERED, in view of the foregoing, that the formal hearing scheduled for May 8, 2007, in Atlanta, Georgia is hereby cancelled.

So ORDERED.

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PATRICK M. ROSENOW
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

[21] See fn. 3.

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. §§