U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 10 April 2009

In the Matter of

THOMAS CONNER
Complainant

v.

ITT CORP.
ITT INDUSTRIES, INC.
and ITT SPACE SYSTEMS DIVISIONS
Respondents

Case No. 2008-SOX-00071

Thomas Conner, *Pro Se*

David L. Greenspan, Esq.
Stephen W. Robinson, Esq.
McLean, Virginia
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

SUMMARY DECISION AND ORDER

This case arises out of a complaint of discrimination filed by Thomas Conner ("Complainant") against ITT Corp., ITT Industries, Inc., and ITT Space Systems Division (collectively "ITT"), pursuant to the employee protection provisions of Section 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.[1] The Act prohibits publicly traded companies 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

[1] 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).

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 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)) . . . ."

By correspondence dated April 23, 2008, and facsimile date-stamped the same day, Complainant filed his complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA"). OSHA Final Investigative Report at 1 (August 22, 2008). On August 22, 2008, the Regional Administrator for OSHA dismissed the complaint as untimely. *Id.* Complainant appealed, requesting a hearing before this Office. The Complainant filed a "Motion for Summary Judgment as a Matter of Law Regarding Claimant's Timely Filing", arguing that his complaint was timely filed. ITT filed a cross-motion for summary judgment on four grounds: (1) the complaint was filed outside the statute of limitations; (2) the Complainant did not engage in protected activity under the Act; (3) the complaint does not allege any adverse action related to protected activity; and (4) ITT would have taken the same adverse employment action regardless of any protected activity. Complainant subsequently filed an opposition to ITT's cross motion which provides additional facts related to the substantive content of his complaint, and argues that his complaint should be considered timely based on the principle of equitable tolling.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ITT employed Complainant as an Assistant Controller, Financial Reporting, Planning and Analysis; his employment began on September 15, 2005. Resp't Mot. Dismiss at 3; Compl. Ex. 6.[2] On February 6, 2007, ITT demoted Complainant to a position that did not include supervisory responsibilities, yet his compensation and grade remained the same. Resp't Mot. Dismiss at 5; Compl. Ex 6. Days prior to his demotion, Complainant questioned accounting figures proposed to be included in an accounting report as raising compliance problems related to the Financial and Accounting Standards Board ("FASB") 146. *Id.* He discussed these concerns with one of his supervisors, Vice President and Controller Mark Chubik. *Id.* On January 21, 2008, ITT informed Complainant that he was being laid off. January 21, 2008 was his last day of employment with ITT, although he continued to receive his pay for 60 days. Rep't Mot. at 8, *citing* Conner Dep. Tr. at 11:2-7 (EX 3).

Discussion

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) (2008). In deciding a motion for summary decision, the allegations shall be considered in a light most favorable to the non-moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The parties' submissions clearly reveal disagreements about the details of the events leading up

[2] Citations to the pleadings are abbreviated as follows: Compl. – Complaint; Compl. Response to Resp't Mot. – Complainant's Response to Respondent's Motion for Summary Judgment; Resp't Mot. – Respondent's Motion for Summary Judgment.

to Complainant's SOX complaint. However, the parties do not dispute the dates of actual events that form the basis of the complaint.

Under the Act, complainants have 90 days "after the date on which the violation occurs" to file a claim with OSHA. 18 U.S.C. § 1514A(b)(2). 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 (2008). In its comments to the Part 1980 regulations, 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 date of filing is considered the date of the postmark, facsimile transmittal, or email communication. 29 C.F.R. § 1980.103(d).

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 his complaint, Complainant stated that his questions regarding FASB compliance "lead to demotion then termination". Compl. at 1. Complainant was demoted on February 6, 2007; he was laid off on January 21, 2008. The postmark on the complaint addressed to OSHA reads April 23, 2008, over a year after his demotion and 93 days after Complainant was laid off. Complainant also points to a facsimile log of transmissions sent from his fax machine to support his claim of timeliness. The log records the date of submission on April 23, 2008, the same date of submission by mail. Just as the postmark is outside the statute of limitations, so is the date of the fax transmission.

The Complainant also alleges he sent an email to OSHA on April 18, 2008, but he has not produced a copy of this email. Resp't Motion, EX 3 at 43. The email allegedly sets out the "basic facts of the case, and basically what [he] was looking for is [*sic*] some of the form [*sic*] and procedures." *Id.* However, in response to Complainant's inquiry regarding this April 18, 2008 email, OSHA states that Complainant never mentioned this email during the course of the investigation; further, OSHA found no evidence of an email filing on this date. OSHA Letter (March 25, 2009) at 2. Complainant also states that he faxed a copy of his complaint to an attorney on April 18 and 23, 2008, and contacted Senator Clinton's office on April 4 and 21, 2008. However, he did not provide copies of his communications with Senator Clinton's office, and Senator Clinton's office's generic response to his communications does not disclose the contents of these communications. *See* Compl. Response to Resp't Mot. The communication

with an attorney is irrelevant to the issue of timely filing. Finally, the Complainant includes a copy of letters sent to the Department of Labor Employment and Training Administration and the Employee Benefits Security Administration; however, he provides no evidence that these letters were mailed, emailed, or faxed, and the content of these letters does not relate to his whistleblower claim.

The implementing regulations, commentary and Board decisions are specific. An employee must file a complaint within 90 days from the date the employee is given notice of the adverse employment decision. Here, in both instances of alleged adverse actions, the notice and adverse action were simultaneous. Therefore, Complainant's filing would be timely if he filed within 90 days of being demoted or laid off. Because he filed his complaint 93 days after the most recent alleged adverse action, the complaint is untimely.

Finally, equitable tolling can be applied to permit the consideration of an untimely complaint, but the circumstances for tolling are limited and are strictly construed. The principal situations where tolling is appropriate with regard to the filing of a complaint are: (1) the defendant actively misled the claimant regarding the claim; (2) extraordinary circumstances prevented the claimant from filing his or her claim; or (3) the claimant filed the precise statutory complaint in the wrong forum. *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981) (citing *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978)). Even viewing the facts in the light most favorable to the Complainant, he does not satisfy any of these factors. In deposition testimony, Complainant stated quite the opposite; he was aware of the 90 day filing period several weeks before April 23, 2008. Resp't Mot., EX 3 at 22. Therefore, equitable tolling principles cannot be applied to his complaint.

Since I have found that the complaint was untimely and equitable tolling does not apply, the Respondent's' motion for summary judgment is granted, and the case is dismissed.

ORDER

IT IS ORDERED that the Respondents' motion for summary judgment is granted, and the complaint is **DISMISSED**.

A

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).