U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 22 August 2008

Case No.: 2008-SOX-00018

In the Matter of:

JOSEPH F. MESSINA, D.O.,

Complainant,

v.

HCA, INC., COASTAL INPATIENT PHYSICIANS, INC., HCA PHYSICIAN SERVICES, ANGELA BRADY AND JAIRY HUNTER, M.D.,

Respondents.

ORDER AND SUMMARY DECISION - DISMISSING COMPLAINT

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (Act), 18 U.S.C.A. § 1514A[1], and its implementing regulations found at 29 CFR Part 1980. Section 806 provides "whistleblower" protection to employees of publicly traded companies against discrimination by employers in the terms and conditions of employment because of certain "protected activity" by the employee.

The Complainant filed this current complaint on September 17, 2007, and alleged that an adverse personnel action had occurred on August 20, 2007. The complaint was denied by the Regional Administrator, Occupational Safety and Health Administration, Atlanta, Georgia, on December 13, 2007. The Complainant filed a subsequent request for hearing before an Administrative Law

[1] VIII of the SOX is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, the employee protection provision, protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio and television fraud), 1344 (bank fraud) or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.

Judge on January 16, 2008. By Order dated July 10, 2008, the formal hearing scheduled for July 22, 2008, in Charleston, South Carolina, was cancelled in order for the Parties to complete discovery and file briefs and supplemental documents on Respondent's Motion for Summary Decision.

On July 3, 2008, Respondent's counsel filed a Motion for Summary Decision. It was supplemented by documents filed on August 4, 2008. Respondent submits (1) at the time of Complainant's termination of employment the employing company was not an "Employer" within the meaning of the Act; (2) at the time of Complainant's termination of employment the named respondents A. Brady and J Hunter were not individuals subject to the Act; (3) Complainant did not engage in activity protected under the Act; (4) the Complainant's termination of employment was for reasons other than that protected by the Act; (5) Complainant cannot amend his date of adverse employment action to include events of October 19, 2007.

On July 8, 2008, Complainant filed an Opposition to Respondent's Motion for Summary Decision. It was supplemented by documents filed on August 15, 2008, and on August 22, 2008. Complainant submits (1) the Respondents are employers and individuals within the meaning of the Act; (2) the Complainant engaged in protected activity with an e-mail transmitted to A. Brady on August 1, 2007; (3) adverse employment action was taken by Respondents against Complainant when he was notified on August 20, 2007, that his employment was being terminated under the terms of his employment contract, paragraph 3.2; (4) adverse employment action was taken by Respondents against Complainant when his employment terminated on October 19, 2007; (5) the adverse employment action taken against Complainant was in response to his protected activity and without justification under the Act. Complainant seeks reinstatement, back pay, compensation for special damages, and relief necessary to make the Complainant whole under the Act.

DISCUSSION

This case arises out of Charleston, South Carolina, an area within the jurisdictional area of the U.S. Court of Appeals for the Fourth Circuit.

Respondents have requested the case be dismissed through summary decision. Summary judgment is proper if the pleadings, discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. The moving party bears the burden of establishing that there is no genuine issue of material fact when the material submitted for consideration is viewed in a light most favorable to the non-moving party. *Celotex Corp. v. Catrett*, 477 US 317, 106 S.Ct. 2548 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US 574, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc*., 477 US 242 (1986).

I. The Complainant has failed to establish that his communication of August 1, 2007, constituted protected activity.

The Complainant alleges that adverse employment action was taken against him in violation of the Act due to concerns addressed in an e-mail he sent to A. Brady on August 1, 2007.

In order to establish a prima facie case under the Act, the Complainant must show, by a preponderance of the evidence when viewed in a light most favorable to him, that (1) he engaged in "protected activity" by providing information or a complaint to a covered supervisor or other individual authorized to investigate and correct misconduct where such information or complaint regarded conduct that he reasonably believed constituted one of six violation types enumerated in § 1514A(a) of the Act[2]; (2) the covered Respondent knew, actually or constructively, of the "protected activity"; (3) the covered Respondent discharged him or took another unfavorable personnel action against him; and (4) his providing the information or making the complaint was a contributing factor to the discharge or other adverse personnel action taken by the covered Respondent. The Complainant must show not only that he believed that the described conduct constituted a violation; but also, that a reasonable person in his position would have believed that the described conduct constituted a violation. The described conduct which constitutes the violation must have already occurred or be in the progress of occurring based on circumstances that the Complainant observes and reasonably believes at the time the information or the complaint was provided. *Livingston v. Wyeth, Inc*., 520 F.3d 344 (4th Cir., 2008); *Welch v. Chao*, ___ F.3d ___. 2008 WL 2971800 (4th Cir., Aug. 5, 2008), see also *Henrich v. ECOLAB, Inc.*, ARB No. 05-030, ALJ Case No. 04-SOX-51 (ARB, June 29, 2006); *Getman v. Southwest Sec., Inc*., ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB, July 29, 2005)

While the Complainant need not cite a code section he believes was violated in his communication to the supervisor or other individual authorized to investigate and correct misconduct, the communication must identify the specific conduct that the employee reasonably believes to be illegal, even if it is a mistaken belief. General inquires do not constitute protected activity. The communication only involves what is actually communicated to the covered employer prior to the unfavorable employment action and not what is alleged in the complaint filed with OSHA. *Welch v. Chao, surpa*, citing *Platone v. FLYi, Inc.*, ARB Case No. 04-154 (ARB, Sept. 29, 2006) and *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310 (S.D.NY., 2006)

The Complainant has submitted a copy of the August 1, 2007, communication, which he alleges is the protected activity of this cause of action, as exhibit "C-0535" in his response to the Motion for Summary Decision. Respondent's counsel submitted a copy of the same document as exhibit "F" and as page 5 of exhibit "G" in the original Motion for Summary Decision.

Complainant's August 1, 2007, communication was sent to manager A. Bradyat 12:16 PM, August 1, 2007, and states:

> "Angela, have you thought about the billing issues with the insurance companies concerning neuro being part of CIP?

[2] The enumerated violations are: (1) 18 US Code § 1341, Frauds and swindles; (2) 18 U.S. Code § 1343, Frauds by wire, radio or television; (3) 18 U.S. Code 1344, Bank fraud; (4) 18 U.S. Code § 1348, Securities fraud; (5) company fraud related to any rule or regulation of the Securities and Exchange Commission; and (6) any violation of federal law relating to fraud against shareholders. 18 U.S. Code § 1514A(a)(1), *Livingston v Wyeth, Inc*., 520 F.3d 344, 352 (4th Cir., 2008)

"Some insurance plans will only pay one physician per dx/CPT code. This is why PPCP had our charges entered on site each day. 1st charge received gets paid. This helped to increase our collections.

"The neurologists in the past would never be the admitting physician and always wanted to be a consultant. If the hospitalists admited (sic) a CVA from the ER, we had to use CVA as a CPT dx admitting (sic) dx and not DM, HTN, Tab abuse, hyperlipidemia as the primary.

"You might want to consider to change this policy and have neurologists be the primary/admitting physician and to CONSULT the hospitalists for medical issues such as DM, HTN, COPD, hypercholestermia and not have us treating CVA's to MAXIMIZE the charges/collections that both specialitys (sic) can charge/collect. Once the patient is stable from a neuro standpoint and is (sic) placement is going to be a long term issue, then TX the pt from the neuro service to the hospitalist service.

"Along the same thought of view, Drs Grishim and Fiorini should have the hospitalists admiting (sic) their surgical patients (if there is a CPT dx to treat and not 'Medical Management' which has no CPT code the last time I checked ICD-9) since they get paid on a global fee/charge when a procedure is involved in a patients (sic) admission. They would have more time to grow their practice rather than treating DM, HTN, ect.

"It has come to my attention that some of the hospitalist have been a wall to admit these patients from them (Drs Grishin and Fiorini).

"The above examples demonstrate that there is no cohesiveness between the various parties involved. I realize that this is a delicate issue with Stark regulations, but 'kick-backs' should not be an issue if the indicated physician is practicing within their field of practice for the best interest of the patients (sic) medical care.

"In closing, the administration has handled the neuro coverage poorly since Oct 06. Professionally, I have had no confidence in the locums coverage the past months and do not feel the need to routinely consult neuro in the future, despite there now being daily coverage. If the patient is complicated and beyond my professional comfort of my internal medicine training, then a consult is indicated. Again, the less consults a hospitalist service patient has, it is easier to discharge and reduce the LOS, which is one reason why Trident has a hospitalist service.

"Hopefully, in the future Dr. Hunter, THS admin and HCAP's will listen to my point of view or is it going to take either a Masters in Medical Management or MBA degree to listen? By then it might be to (sic) late."

The unfavorable employment action was the termination of employment that took place on August 20, 2007, when the Complainant was notified that his employment was being terminated pursuant to paragraph 3.2 of his May 31, 2006, employment contract.[3] He subsequently filed a complaint under the Act on September 17, 2007. Since the adverse employment action of record occurred prior to the Complainant's filing of a complaint with OSHA, the mere act of filing a timely complaint in this case does not amount to "protected activity" in this case.

When the August 1, 2007, communication is viewed most favorably to the Complainant, there is no manifestation of specific conduct that had occurred or was in the process of occurring that constituted a fraudulent activity encompassed by the Act. The first paragraph of the communication inquires if Ms. Brady had considered billing issues with insurance companies and neuro being part of Coastal Inpatient Physicians, Inc. This is at best a general inquiry and not a specific complaint of fraudulent conduct. Additionally, the next three paragraphs detail a

[3] The unequivocal notice to an employee that the employer had decided to terminate the employee's employment is the point of adverse employment action even if the date of final pay is a subsequent date. See *Salin v. Reedhycalog UK*, 2007-SOX-20 (ALJ May 11, 2007); *Rollins v. American Airlines, Inc*., ARB No. 04-140, ALJ No. 2004-AIR-9 (ARB Apr. 3, 2007); *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988), *rev'd on other grounds*, 496 US 71 (1990) Here, the date of final pay, October 19, 2007, cannot form a new basis of Complainant's adverse employment event.

way to maximize medical charges to insurance companies and to maximize collection of fees. These paragraphs do not set forth a specific complaint of fraudulent activity that occurred, or was occurring, but rather a recommendation on a manner to increase monetary receipts in the future. Paragraphs five and six are a suggestion on how two specific physicians should have hospitalists admit their surgical patients and does not refer to a specific complaint of fraudulent activity that has occurred or was occurring August 1, 2007. Paragraph seven uses the term "Stark regulations, 'kick-backs'" but not as a specific complaint of fraudulent activity that Respondent had engaged in or was engaging in, but rather that if his suggestions on admission and billing were utilized in the future, they would not violate Stark regulations or prohibitions on "kick-backs." The final two paragraphs set forth the Complainant's belief he would not routinely consult with neurologists in the future and hoped that his point of view would be considered. These paragraphs do not set forth a specific complaint of fraudulent activity that had occurred or was occurring by August 1, 2007.

Complainant's counsel submits that the Complainant "notified his superior, Angela Brady, via e-mail on August 1, 2007, of his concerns regarding Medicare concurrent billing [and Complainant] reasonably believed that such conduct was impermissible under Medicare, and that such fraudulent billing activities necessarily involved the use of mail or the internet. … [and] that such conduct constituted a fraud against shareholders." Contrary to counsel's submission, there was no indication in Complainant's August 1, 2007, communication that Respondent had engaged or was engaging in Medicare fraud, mail fraud, wire fraud or fraud on shareholders. None of the words "fraud", "mail", "wire", "Medicare", or "double-billing" were used in the August 1, 2007, communication. The communication provided a means to maximize billing income through the future procedure of having neurologists being admitting physicians and hospitalists providing services for secondary diagnoses. There was no expression of impermissible conduct having occurred or occurring in the August 1, 2007, communication.

Complainant's counsel submitted a copy of Complainant's June 26, 2008, deposition in support of his positions. On page 210 to 213 of the deposition, the Complainant stated that the shareholders would be defrauded because 20 to 26% of the income derived by Coastal Inpatient Physicians, Inc., was from CMS (Consolidated Medicare Services Administration); that a corporate integrity agreement covered the financial operations of Respondent; and that if Respondent was found in violation of the integrity agreement the Respondent would loose all income from CMS. The Respondent submitted a more inclusive copy of the Complainant's deposition testimony related to his August 1, 2007, communication at pages 179 through 230. On pages 180 to 182 of his deposition the Complainant states that his concern when notified of a neurologist joining the practice on August 1, 2007, was that CMS would scrutinize the billing process and he wouldn't be able to bill for the same service and that having the neurologist and hospitalist in the same practice could violate anti-kick-back regulations applicable under a corporate integrity agreement. On page 210 the Complainant testified that he was "not sure what happened between 7 AM and 12:16 PM [the time of his e-mail communication] on August 1" in relation to his lack of knowledge as to whether the neurologist had started working for the practice that day. In his August 1, 2007, communication, the Complainant never mentioned concerns about violations of the corporate integrity agreement having occurred or being ongoing, nor mentioned any concerns about CMS. The Complainant's concern was about <u>future</u> billing practice with a new neurologist in the same practice, and not a concern over fraudulent activities

that had occurred or were ongoing. Indeed, the Complainant had no knowledge of any billing by the neurologist that may have occurred prior to the e-mail communication at 12:16 PM on August 1, 2007.

After deliberation on the arguments, supporting briefs, and supporting documents submitted by counsel, this Administrative Law Judge finds that the Complainant has failed to establish that he communicated to appropriate personnel that fraudulent activity with the scope of the Act had occurred, or was ongoing, and as such has failed to establish he engaged in "protected activity" as required by the Act . Accordingly, the Respondent is entitled to summary decision and dismissal of the complaint.

II. For purposes of the Motion for Summary Decision, the Complainant has established that the Respondents are employers/individuals under the Act.

The documentary evidence submitted by the Parties, when viewed in the best light for the non-moving party, establishes that the interlocking directorships, the interlocking staffing assignments, use of misleading business names, meeting Section 15(d) filing requirements with the Securities and Exchange Commission, and decisional process in the adverse employment action taken on August 20, 2007, establishes that the business entities involved and named individuals involved are subject to the Act.

It is specifically noted that the caption identity of "HCA Physician Services" may require correction, should the case be remanded for formal hearing. There is an indication from Respondent's counsel that it is a business name used by Tennessee Healthcare Management, Inc., such that the proper caption would be "Tennessee Healthcare Management, Inc., d/b/a HCA Physician Services." There is also indication from Respondent counsel's submissions that it is a business entity associated with the unnamed entity, HTI Hospital Holdings, Inc.. The conflict would be an issue to be addressed. Additionally, other documents submitted infer that additional business entities may be interlocked into this case. Accordingly, should the case proceed to hearing, the Parties should be prepared for proper identification of and notice to all business entities with interlocking officers, managers, and employees relevant to the case.

III. The remaining issues raised by the Parties are moot.

In that the Complainant has failed to establish a prima facie case, due to the lack of engaging in protected activity, the remaining procedural issues raised by the Parties are now moot.

FINDINGS OF FACT

After deliberation on all the submissions of the Parties, this Administrative Law Judge finds, for the sole purposes of the Motion for Summary Decision, that:

1. The Respondents are employers/supervisors within the meaning of the Act.

2. The Complainant submitted a written communication by e-mail to his management supervisor, A. Brady, at 12:16 PM, August 1, 2007, which is the basis of the Complainant's request for relief under the Act.

3. Management supervisor A. Brady received the Complainant's written e-mail communication on August 1, 2007.

4. The Complainant suffered an adverse employment action on August 20, 2007, when his employment was terminated under paragraph 3.2 of his employment contract.

5. The Complainant failed to establish an adverse employment action was incurred on October 19, 2007.

6. The Complainant's written e-mail communication of 12:16 PM, August 1, 2007, was not a communication that arose to the level of "protected activity" under the Act.

7. The Complainant has failed to establish a prima facie case for relief under the Act.

8. The Respondents are entitled to a summary decision in the form of Dismissal of the cause of action.

ORDER

It is hereby **ORDERED** that **the Motion for Summary Decision is GRANTED** and **the cause of action is DISMISSED.**

A

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

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. 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).