U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 December 2008

Case No.: 2008-SOX-00073

In the Matter of:

EDWIN MOLDAUER,
Complainant,

v.

CANANDAIGUA WINE CO.,
Respondent.

ORDER DISMISSING COMPLAINT

This matter arises out of a complaint filed by Edwin Moldauer ("Complainant") against Canandaigua Wine Co., ("Respondent") under 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.A. § 1514A ("SOX" or the "Act").

On September 30, 2008, I issued an order directing Complainant to show cause, no later than October 20, 2008, why his complaint should not be dismissed for untimeliness and/or for failure to state a claim upon which relief can be granted. Instead, on October 20, 2008, Complainant filed a request for stay of these proceedings pending the outcome of *Canandaigua Wine Co. v. Moldauer,* U.S. District Court for the Eastern District of California Case No. 1:02-cv-6599 OWW CLB. A member of my staff contacted counsel for Respondent and invited Respondent to file a response. Respondent did not do so. On November 19, 2008, I issued an Order denying Complainant's request for stay of proceedings, and extended the deadline for Complainant to show cause why his complaint should not be dismissed to December 9, 2008, 20 days after the date of that Order. Complainant did not file anything in response to that Order, and has not filed a response as of the date of this Order.

Factual Background[1]

Complainant's employment with Respondent was terminated on October 7, 2002. On November 1, 2002, Complainant signed a severance agreement with Respondent. Complainant

[1] Facts set forth in this section are derived from the Complaint in this matter, as well as the Order Granting Motion for Summary Decision in Complainant's earlier SOX claim, 2003-SOX-00026 and the Final Decision and Order of the Administrative Review Board in Complainant's earlier SOX claim, ARB Case No. 04-022. In my Order to Show Cause, I informed the parties that I intended to take judicial notice of those documents and offered them the opportunity to object. Complainant objected, but gave no grounds for his objection. I find it appropriate to take official notice of the decisions in the earlier claim.

filed a claim under the Act on April 24, 2003, alleging retaliation for his purported disclosure of financial improprieties. The Occupational Safety and Health Administration dismissed that complaint as untimely. Complainant objected to the dismissal and requested a hearing before an administrative law judge. The administrative law judge dismissed the complaint as untimely, and Complainant appealed that decision to the Administrative Review Board. The Board upheld the decision of the administrative law judge, finding that the complaint was untimely filed and that Complainant had not shown any basis to toll the statute of limitations.

After Complainant's termination, in late 2002, Respondent filed an action in the U.S. District Court for the Eastern District of California, asserting claims that Complainant misappropriated trade secrets, intentionally interfered with its economic advantage, breached his employment contract, and libeled Respondent.[2] After that case apparently lay dormant for some time, the district judge directed that the parties submit a trial schedule by April 22, 2008, with a trial date no later than January 5, 2009. [Attachment 1 to Complaint.] As an alternative, the judge suggested that the parties enter into a tolling agreement under which the case would be dismissed with the possibility that it could be re-filed. [*Ibid.*] Complainant's attorney in that matter informed him on April 15, 2008 that Respondent would not agree to dismiss the federal court action, with the result that the case would be set for trial. [Attachment 2 to Complaint.]

On June 25, 2008, less than 90 days after being informed that Respondent would not agree to dismiss the federal court action, Complainant filed the instant SOX complaint, alleging that Respondent's insistence on going to trial constituted retaliation under the Act. In addition, Complainant alleged (1) that he was compelled to undergo arbitration in a commercial dispute while his earlier complaint was under consideration by the Administrative Review Board, and that his fees were not refunded after the arbitration was "blocked" by a New York state court; (2) that he was subjected to Internet abuse and threats; (3) that his severance agreement is invalid; and (4) that a recent $832 million loss by Respondent can be traced to the allegations he made six years earlier.

Legal Framework

A. STANDARD FOR DISMISSAL

Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not address motions to dismiss, 29 C.F.R. § 18.1 (a) provides that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move for dismissal on the grounds that a complaint does not state a claim upon which relief can be granted. On its face, the Rule refers to such dismissal on the motion of a party; however, it has been uniformly held that a court may dismiss a complaint for failure to state a claim upon which relief can be granted when it is patently obvious that the complainant could not prevail on the facts as alleged in the complaint. Courts have the inherent power to take such action, or to find that a complaint is frivolous on its

[2] I take official notice of the docket in *Canandaigua Wine Co. v. Moldauer*, U.S. District Court for the Eastern District of California Case No. 1:02-cv-6599 OWW CLB, having notified the parties of my intent to do so and offering them the opportunity to object. Again, Complainant objected, but gave no grounds for his objection. I find it appropriate to take official notice of the documents contained in the docket of that matter.

face. *See Koch v. Mirza,* 869 F.Supp. 1031 (W.D.N.Y. 1994); *Washington Petroleum and Supply Co. v. Girard Bank,* 629 F.Supp. 1224 (M.D. Pa. 1983); *Johnson v. Baskerville*, 568 F.Supp. 853 (E.D. Va. 1983); *Cook v. Bates,* 92 F.R.D. 119 (S.D.N.Y. 1981). Such a conclusion is not a determination on the merits, but involves an inquiry as to whether, even assuming that all of the Complainant's allegations are true, he has stated a cause of action upon which relief can be granted. Assuming the truth of Complainant's allegations, I find that the Complainant failed to file a timely complaint, and that even assuming his complaint was timely, it does not state a claim upon which relief can be granted.

B. WHISTLEBLOWER PROTECTION PROVISIONS OF THE ACT

The Act provides whistleblower protection for employees of publicly-traded companies who provide information or participate in an investigation relating to violations of certain criminal statutes relating to fraud, rules or regulations of the Securities and Exchange Commission, or any provisions of Federal law relating to fraud against shareholders.[3] To be protected, the information must have been provided to the employee's superior or to another employee with the authority to investigate, discover, or terminate the misconduct, to federal law enforcement or regulatory personnel, or to members of Congress; or the employee must have participated in proceedings relating to the violation. Actions brought under the Sarbanes-Oxley Act are governed by the burdens of proof set forth under 49 U.S.C. §42121(b), the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21."). 15 U.S.C. §1514A(b)(2)(C); *Halloum v. Intel Corporation,* ARB No. 04-068, ALJ No. 2003-SOX-7 (ARB Jan. 31, 2006); see also 29 C.F.R. §1980.104 (discussing general burdens of proof for SOX claim).

To prevail at the adjudication stage of a SOX claim, a complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity; (2) the respondent knew that he engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action, i.e., an adverse employment action; and (4) the protected activity was a contributing factor in the unfavorable action. *Halloum, supra*, ARB No. 04-068, slip op. at 6, citing *Getman v. Southwest Securities*, Inc., ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005), *recon. denied* (ARB March 7, 2006). If a complainant proves the elements of his case by a preponderance of the evidence, the respondent may still avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Halloum,* ARB No. 04-068, slip op. at 6.

C. TIMELINESS

A SOX complaint must be filed with the Secretary of Labor (OSHA) within 90 days of the alleged retaliation. 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.

[3] Although Complainant has not stated with specificity what violations of law he believes took place, I will again assume for purposes of this decision that the information he provided to Respondent's Director of Billing, to the Pennsylvania unemployment office, and to the FBI were sufficiently detailed and involved violations of the statutes identified in Section 1514A.

Complainant filed his complaint on June 26, 2008. For that complaint to be timely, some retaliatory act must have occurred on or after March 28, 2008. The only act alleged by Respondent as falling within that 90-day period was Respondent's decision to go to trial in the federal court action. As Respondent did not respond to my Order to Show Cause, as amended, he has not shown that the other alleged retaliatory actions occurred within the 90-day period before June 26, 2008. For that reason, and because the Complaint specifically identified only Respondent's decision to go to trial as having occurred within the previous 90 days, I find that the other acts (compelled arbitration, Internet abuse and threats, invalidity of severance agreement, and that a recent $832 million loss by Respondent can be traced to the allegations he made six years earlier) occurred prior to March 28, 2008 and are therefore time-barred.

The issue, then, is whether Respondent's decision to go to trial rather than dismiss its federal court action against Complainant is cognizable as a claim under the Act.

D. DISCUSSION

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 the employee engaged in protected activity. 18 U.S.C. 1541A (a). In this matter, Complainant was no longer an employee at the time of the alleged retaliation. In general, an employer is subject to liability under SOX only for retaliation against its current employees. *See Harvey v. Home Depot, Inc.*, 2004-SOX-36 at 4 (ALJ) (May 28, 2004), *aff'd* Nos. 04-114 and 115 (ARB June 2, 2006) (with exception of blacklisting and interfering with a complainant's subsequent employment, SOX protects an employee from retaliation for protected activities while the complainant is employed by the employer). As Complainant's allegations do not involve blacklisting or interference with subsequent employment, Respondent's decision to go to trial in the federal-court action does not constitute discrimination in the terms and conditions of employment, and cannot be the basis of a claim under the Act.

In addition, assuming the timeliness of the complaint with respect to the other four alleged acts of retaliation, I find that none of them qualifies under the Act as discrimination in the terms or conditions of employment. Again, Complainant has not been an employee of Respondent since late 2002, and the alleged retaliatory acts do not qualify as blacklisting or interference with subsequent employment. Furthermore, even assuming that they occurred while Complainant was employed by Respondent, no relief can be granted on those acts because the Complaint was filed over 5 years after termination of the employment.

Conclusion

Complainant's claim, to the extent that it is based on compelled arbitration, Internet abuse and threats, invalidity of his severance agreement, and that a recent $832 million loss by Respondent can be traced to the allegations he made six years earlier, are untimely and must be dismissed on that basis.

Complainant's claim, based on all five of the allegedly retaliatory acts, including the four acts set forth in the preceding paragraph and on Respondent's decision not to dismiss the federal court action but to go to trial on that complaint, fails to state a claim on which relief can be granted, and must be dismissed on that basis.

Complainant's failure to respond to my Order to Show Cause as amended by my Order Denying Stay of Proceedings further warrants dismissal for failure to prosecute this matter.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that Complainant's Complaint be, and the same hereby is, DISMISSED WITH PREJUDICE.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
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. 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).