



Issue Date: 22 September 2008

Case No.: 2008-SOX-0045

In the Matter of:

JOSHUA ROGERS,
Complainant

v.

AMERIPRISE FINANCIAL SERVICES, INC.,
Respondent

DECISION AND ORDER DISMISSING COMPLAINT

This proceeding arises from a claim of whistleblower protection under § 806 of the Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A. The statute and implementing regulations at 29 CFR Part 1980 (2007) prohibit retaliatory or discriminatory actions by publicly traded companies against their employees who provide information to their employers, a federal agency, or Congress, alleging violation of any Federal law relating to fraud against shareholders. The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (“OALJ”) found at 29 CFR Part 18, Subpart A, also apply. *See* 29 CFR § 1980.107(a). Reference may be made to the Federal Rules of Civil Procedure to address issues not specifically covered by the OALJ Rules of Practice and Procedure. *See* 29 CFR §§ 18.1(a) and 18.29(a)(8).

A telephone conference was held on June 25, 2008. On July 23, 2008, I issued an Order giving the parties 90 days to complete discovery and setting November 13, 2008, as the deadline for the parties to file dispositive motions. On August 4, 2008, the Respondent filed a motion to dismiss the claim as untimely, or in the alternative, to stay the claim pending the outcome of the Federal court action filed by the Complainant. On August 14, 2008, the Complainant filed a response arguing that equitable tolling should be applied.

The parties acknowledge that the Complainant was notified that he was being terminated by his supervisor and the senior vice president of Ameriprise on May 29, 2007, and that he was then escorted from the building. On June 4, 2007, Complainant’s counsel notified the Respondent that he had been retained to represent the Complainant with regard to his termination and alleged that it was wrongful and in violation of Ameriprise’s policies. The Respondent filed a Form U-5 on June 19, 2007, as it was required to do as a member of the registered member of the Financial Industry Regulatory Authority. This form noted that the Complainant was terminated for “violation of company policy – code of conduct – non securities related.”

The Respondent contends that the Complainant’s claim is untimely, as the Sarbanes-Oxley Act requires a complaint to be filed within 90 days of the alleged retaliation. 18 U.S.C. § 1514A(b)(2)(D); 29 CFR § 1980.103(d). The Complainant responds that equitable tolling

should be applied, because the Complainant was not notified by the Respondent of the reason for his termination until he received the Form U-5 on or about June 21, 2007. The Complainant contends that the Respondent actively misrepresented that a previous incident had been resolved, while using the previous incident as the reason for his termination on the Form U-5.

The Complainant's employment was terminated verbally at a face-to-face meeting on May 29, 2007. Unequivocal verbal notice of termination triggers the running of the statute of limitations. 29 CFR § 1980.103 (2007); *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Aug. 31, 2005); *Salian v. Reedhycalog UK*, 2007-SOX-20 (ALJ May 11, 2007). This act was sufficient to trigger the running of the 90-day statute of limitations.

The Complainant argues that the Respondent's failure to provide a reason for his termination should toll the statute of limitations until the Complainant acquired evidence that the termination was wrongful. I find this argument unpersuasive. Although the Complainant suggests that he had no evidence of a retaliatory motive, Complainant's counsel alleged in the June 4, 2007, letter to the Respondent that he believed the termination to be wrongful and in violation of Ameriprise's policies. Moreover, the Complainant has conceded that he received actual notice of the reason for his termination on or about June 21, 2007, well within the 90-day filing period. Furthermore, the Administrative Review Board has explained that neither the statute nor its implementing regulations require a complainant to acquire evidence of retaliatory motive before proceeding with a complaint and that a complainant's failure to acquire evidence of motivation for the termination does not affect his rights or responsibilities for initiating a complaint under the Sarbanes-Oxley Act. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Aug. 31, 2005). Although the Complainant argues that he was without knowledge that his termination was wrongful and that the Respondent actively misled him into believing that the previous incident had been resolved, these arguments are inconsistent with the June 4, 2007, letter to the Respondent from Complainant's counsel, and undermined by the Complainant's receipt of the Form U-5 on or about June 21, 2007. The Complainant was required to file his claim within 90 days of receiving "final, definitive, and unequivocal notice" of his termination, regardless of whether he had evidence of the Respondent's motive or was aware that his termination constituted a legal wrong. *Coppinger-Martin v. Nordstrom, Inc.*, 2007-SOX-19 (ALJ Apr. 4, 2007).

Accordingly, the Respondent's motion to dismiss is hereby GRANTED, and the Complainant's claim is DISMISSED.

A

Alice M. Craft
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 CFR § 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 CFR § 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 CFR § 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 CFR § 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 CFR §§ 1980.109(c) and 1980.110(a) and (b).