U.S. Department of Labor

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Issue Date: 06 October 2008

Case No.: 2008-SOX-57

In the Matter of

BRIAN A. SMALE,
Complainant

v.

TORCHMARK CORPORATION,
Respondent

Order on Motion for Summary Decision and Dismissal

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 Complainant against Respondent.

Complainant filed his initial complaint on 19 Feb 08. The matter was investigated and on 17 Jul 08 a determination was issued that the complaint was untimely. On 4 Aug 08, Complainant filed objections and requested a formal hearing. The matter was set to be heard on 12 Jan 09. Pursuant to an agreed scheduling order, Complainant filed a formal complaint on 6 Sep 08. Respondent filed a motion to dismiss on summary decision for timeliness of the initial OSHA complaint and Complainant has filed a response. Respondent is represented by counsel and Complainant is pro-se.

APPLICABLE LAW

Under the Act and applicable regulations, a complainant must file his 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). . ."[3]

[1] 18 U.S.C. § 1514A *et. seq.*
[2] 29 C.F.R. Part 1980.
[3] 29 C.F.R. § 1980.103(d); 18 U.S.C. §1514A(b)(2)(D).

The 90 day period is not jurisdictional and equitable tolling may apply. There are "three principal situations in which equitable modification may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when "the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum."[4]

The limitation period begins when the complainant is aware of his protected activity and an adverse action. "Neither the statute nor its implementing regulations indicate that a complainant must acquire evidence of retaliatory motive before proceeding with a complaint. [A complainant's] failure to acquire evidence of … motivation for his suspension and firing did not affect his rights or responsibilities for initiating a complaint pursuant to the SOX." [5]

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."[6]

Parties are allowed to seek a summary decision without a full hearing.[7] 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.[8]
>
> 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 must set forth specific facts showing that there is a genuine issue of fact for the hearing.[9]

The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[10] In a motion for summary

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[4] *Ubinger v. CAE International*, 2007-SOX-36 (ARB Aug. 27, 2008)(citations omitted).
[5] *Halpern v. XL Capital, Ltd.*, 2004-SOX-54 (ARB Aug. 31, 2005)(citations omitted).
[6] 29 C.F.R. § 1980.107(a).
[7] 29 C.F.R. § 18.40.
[8] 29 C.F.R. §§ 18.40(d), 18.41(a).
[9] 29 C.F.R. § 18.40(c).
[10] *Moldauer v. Canandaigua Wine Co.*, 2003-SOX-26 (ARB) (Dec. 30, 2005).

disposition, the moving party has the burden of establishing the "absence of evidence to support the nonmoving party's case."[11] 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.[12]

DISCUSSION

Complainant alleged that he submitted three risk observations that led to his discharge. In his complaint and response to the motion to dismiss, Complainant acknowledges that he was terminated on 2 Feb 07 and filed his complaint with OSHA not earlier than 18 Feb 08. However, he argues that equitable tolling should apply, as he was actively misled by Respondent concerning the cause of action. Specifically, he was misled as to which risk observation was the motivating factor for Respondent's action.

In support of his position, he submitted an affidavit in which he states that on 14 Feb 07, Respondent's counsel told him that his firing was a rash decision made by a manager with whom it was difficult to work. He also told Complainant that she based her firing decision on the last of his risk assessments.[13] Complainant argues that the third of his risk assessments was not related to the Act and therefore not a protected activity. He maintains the period should be tolled until such time as he discovered that the firing decision was based on the second risk observation, which involved actions coming within the Act and was a protected activity.

Complainant's view of the tolling provisions would mean that the 90 day filing period would never begin to run until a respondent conceded in some form that protected activity was a basis for the adverse action. In other words, if a respondent maintained that the adverse action was unrelated to the protected activity, and continued to tell the complainant so, the 90 day period would never elapse.

Complainant knew that he had engaged in protected activity and was thereafter terminated. He failed to file his claim within the requisite 90 days. Respondent's assertion to him that the firing was a rash decision based on non-protected activity does not constitute actively misleading him as to the cause of action and require a tolling of his filing period. Accordingly, the record presents no genuine issue of material fact that would allow for a finding that Complainant filed his compliant within the established period or is entitled to equitable relief. Therefore, the motion is granted.

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[11] *Wise v. E.I. DuPont De Nemours and Co., 58 F.3d 193* (5th Cir. 1995).

[12] *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

[13] Respondent's motion and submissions dispute Complainant's assertions. However, for the purposes of this motion, Complainant need only establish that a genuine issue of material fact exists. Therefore, I assume the facts as Complainant asserts them. It is also important to note that there is no evidence that Complainant was led to believe Respondent was going to reconsider the termination decision or otherwise given by Respondent any reason wait and see rather than act on any cause of action. Indeed, he quickly sought relief on other grounds.

ORDER

The hearing set for 12 Jan 09 is cancelled and the complaint is dismissed.

SO ORDERED this 6th day of October, 2008 in Covington, Louisiana.

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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, 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).