U.S. Department of Labor

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Issue Date: 03 November 2008

In the Matter of

Case No. 2008-SOX-00046

MICHAEL G. SMITH
Complainant

v.

BRANCH BANKING & TRUST COMPANY,
CHARLES MATTOX and SANDRA BLANTON
Respondents

Michael G. Smith, *Pro Se*

Jill Stricklin Cox
Winston-Salem, North Carolina
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED SUMMARY DECISION AND ORDER
DISMISSING COMPLAINT

This case arises out of a complaint of discrimination filed by Michael Smith ("Complainant") against Branch Banking & Trust Company (BB&T), Charles Mattox and Sandra Blanton, 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 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[2] of any company "with a class of

[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).

[2] "Employees" include those individuals both currently and formerly working for a company. 29 C.F.R. § 1980.101.

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)) . . . ."

On September 25, 2007, Complainant filed his initial complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA"). OSHA Final Investigative Report at 1 (May 1, 2008). Complainant raised further contentions in a December 25, 2007 letter which he termed an "amendment" to his earlier complaint.[3] *Id.* On May 1, 2008, the Regional Administrator for OSHA dismissed both complaints as without merit. *Id.* On May 29, 2008, Complainant requested a hearing before this Office regarding the complaints' dismissal. Req. for Hr'g.[4] The respondents filed a Motion to Dismiss on three grounds: (1) the initial complaint was filed outside the statute of limitations; (2) the amended complaint states no additional adverse action; (3) the Complainant's failure to include the individual respondents Mattox and Blanton in his notice of appeal bars any further action against them as individuals.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BB&T employed Complainant as a corporate fraud investigator, assigned to the bank branch in Shelby, North Carolina. *Compl.* ¶ 3. On June 26, 2007, Respondent denied Complainant's application for a promotion to a Financial Center Leader (FCL) position in Boiling Spring, North Carolina. *Id.* at ¶7. On July 20, 2007, Lenore Henry, the Sales and Service Leader who interviewed Complainant for the FCL position, spoke with Complainant about their interview. Resp't Mot. Dismiss ¶1. Henry explained that Complainant had appeared unenthusiastic about the FCL opportunity, and that another employee with higher sales figures was offered the position. Compl. ¶8, Resp't Answer at 4.

For several months prior to being denied the promotion, Complainant had grown increasingly concerned about a co-worker's series of loans to a particular developer, Peerless Real Estate, for lots located in the Village of Penland in Spruce Pine, North Carolina. Compl. at ¶3-4. Complainant spent two to three hours each day between February and April, 2007, conducting a personal investigation into the loans. *Id.* at ¶10. Around the end of February 2007, Complainant expressed his concerns to Amy Stroupe, a Corporate Investigator for BB&T. *Id.* at ¶5. Subsequently, Complainant believed that his second level supervisor, Charlie Mattox, was involved in the fraudulent loans and reported his concerns to Sandra Blanton, a Human Relations Manager for BB&T, on September 4, 2007. Am. Compl. ¶1, Resp't Answer at 5.

On September 26, 2007, Mattox and Complainant's direct supervisor, Barbara Ivie, met with Complainant in the conference room at the Shelby Branch. Blanton joined the conference by speakerphone. *Id.* at ¶3, Resp't Answer at 6. During the meeting, Mattox informed Complainant that the proper banking and federal authorities were investigating the fraudulent loans to Peerless Real Estate. *Id.* Mattox requested that Complainant discontinue his personal

[3] In actuality, the December 25, 2007 letter, which raises new allegations, is a separate complaint rather than an amendment of the initial complaint. But for the sake of simplicity, I will refer to it as the amended complaint.

[4] Citations to the record are abbreviated as follows: Compl. – Complaint; Am. Compl. – Amended Complaint; Req. for Hr'g. – Request for Hearing; Resp't Answer – Respondent's Answer; Resp't Mot. Dismiss – Respondent's Motion to Dismiss.

investigation into the loans unless the investigating authorities requested his assistance. *Id.* On October 5, 2007, Ivie spoke with Complainant privately and asked that he cease disrupting the work of other BB&T employees. *Id.* On November 21, 2007, Complainant filed another internal complaint regarding the actions of Blanton, claiming that she had violated confidentiality with regard to his earlier grievance against Mattox. *Id.* at ¶12, Resp't Answer at 8.

Discussion

I. Legal standards

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 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 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)).

II. Defective service of hearing request

Individual respondents Blanton and Mattox seek dismissal of the complaint against them based on Complainant's failure to list them as parties in his request for hearing and to serve them with a copy of his objections or request for hearing regarding the Secretary's Findings and Preliminary Order. Blanton and Mattox cite no authority besides 29 C.F.R. § 1980.106(a)-(b) in

support of their motion. These regulations provide that, "any party who desires review, including judicial review, of the findings and preliminary order, . . . must file any objections and a request for a hearing on the record within 30 days of receipt of the preliminary order . . . ." 29 C.F.R. § 1980.106(a) (2008). The regulations continue, "if no timely objection is filed . . . the finding or preliminary order, . . . shall become the final decision of the Secretary, not subject to judicial review." § 1980.106(b)(2).

In Complainant's Request for Hearing, he stated, "I wish to file a [*sic*] objection and to request a hearing before an Administrative Law Judge in reference to *my SOX case 4-3750-07-028*." (emphasis added). He continued by providing his name and contact information and listed the "Company alleged to have violated the Sarbanes-Oxley Act" as BB&T. *Id.* In explaining his request for a hearing, Complainant specifically referred to "defendants," and stated that he "would like to file an objection to these findings . . . ." *Id.*

By referencing the entire case number, Complainant indicated that he desires review of the preliminary order as a whole and seeks judicial review of the entire case. His reference to "defendants" also suggests that he wishes to continue to pursue his complaint against all the parties, BB&T, Mattox and Blanton, collectively. Further, Respondent's Motion makes no showing that Complainant's failure to specifically list their names in his request for a hearing has created any prejudice or somehow impeded their ability to proceed in the case.

For these reasons, I find that this contention is meritless.

III. Timeliness of initial complaint

In his initial complaint, Complainant stated that BB&T's denial of his promotion to an FCL position was in response to his personal investigation of the fraudulent loans. BB&T informed Complainant that he would not be promoted on June 26, 2007. Complainant filed his inital complaint with OSHA on September 25, 2007, 91 days after BB&T informed him he would not be promoted. Complainant argued that he did not become aware that the adverse action was linked to his protected activity until July 20, 2007 when he and Lenore Henry discussed his interview for the FCL position.

The implementing regulations, commentary and Board decisions are specific. A complainant must file within 90 days of the employer's communication of the adverse employment decision. The 90 days begins to run from the date the employee is given notice of the adverse employment decision, not from the day the employee realizes the connection between his or her protected actions and the employer's adverse action. Therefore, in the instant case, Complainant's filing would be timely if he filed within 90 days of being notified that he would not be promoted. Because he filed outside the 90 days window (even though by just a single day), the initial complaint was untimely.

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 did not plead facts that meet the recognized scenarios for the application of equitable tolling. Therefore, equitable tolling principles cannot be applied to his initial complaint.

Since I have found that the initial complaint was untimely and the principles of equitable tolling do not apply to these facts, the initial claim must be dismissed.

IV. Failure to plead additional adverse action in amended complaint

Under the Act, no employer that comes within the scope of the statute "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee." 18 U.S.C. § 1514A(a). *See also* 29 C.F.R. § 1980.102 (2008). The Board has held that the standard for adverse employment action established in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 US 53 (2006), applies to cases governed by the provisions of AIR 21, including cases under Sarbanes-Oxley. *Hirst v. Southeast Airlines, Inc.*, ARB Case No. 04-116, slip op. at 10 (ARB Jan. 31, 2007); *see also Melton v. Yellow Transp. Inc.*, ARB Case No. 06-052 (ARB Sept. 30, 2008); *Allen v. Administrative Review Board*, No. 06-60849, ___ F.3d ___, 2008 WL 171588 (5th Cir. Jan. 22, 2008).

Burlington Northern requires the complainant to show that a "reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 548 US at 68, *citing Rochon v. Gonzales*, 438 F.3d 1211, 1219 (C.A.D.C. 2006) (internal citations omitted). The Court emphasized that "reasonable employee" is an objective standard that is judicially administrable. *Id.* The objective standard, the Court explains, "separate[s] significant from trivial harms," such as personal conflicts or slighting by supervisors or co-workers. *Id.* Applying the *Burlington Northern* standard, the Board requires employees to show "tangible employment action" resulting in "a significant change in employment status." *Hirst*, ARB Case No. 04-116, slip op. at 9. Examples of tangible employment action include firing, failure to promote, reassignment that significantly changes responsibilities, or significant change in benefits. *Id.* (citing *Jenkins v. EPA*, ARB No. 98-146, slip op. at 21 (ARB Feb. 28, 2003)).

Even reading the complaint in a light most favorable to Complainant, he failed to allege facts that meet the *Burlington Northern* objective standard for adverse employment action. On September 27, 2007, Complainant's supervisors, Mattox and Ivie, met with Complainant in a conference room at the Shelby Bank. Blanton joined the conference by speakerphone. At the meeting, Mattox and Ivie presented Complainant with options for his annual review and asked that he cease conducting his personal investigation of the questionable loans. Complainant emphasized the "embarrassing" location of the meeting, a glassed-in conference room, which he associated with employee discipline. Complaint also noted Mattox's demeanor the day of the meeting, stating that Mattox was not as cordial as he had been in the past. Finally, Complainant cites the failure of Henry Skinner, BB&T's Human Systems Manager, to respond to his internal

complaint regarding Blanton's handling of his complaint against Mattox. Complainant noted that 34 days had passed without a response from Mr. Skinner.

Complainant's amended complaint does not meet the materially adverse action standard required by the Act. A reasonable person would not conclude that a meeting regarding Complainant's job performance, even in a visible location; a supervisor's atypical behavior; or the slow pace of responding to telephone calls and emails; are materially adverse, if adverse at all.

Accordingly, I find that the amended complaint is without merit and must be dismissed.

ORDER

IT IS ORDERED that both the initial and amended complaints are **DISMISSED**.

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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).