U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 October 2008

CASE NO.: 2008-SOX-00055

In the Matter Of:

GREGG SNYDER
Complainant

v.

WYETH PHARMACEUTICALS
Respondent

DECISION AND ORDER DISMISSING COMPLAINT

This proceeding arises from a complaint of discrimination filed 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 (West 2004) and the procedural regulations found at 29 C.F.R. Part 1980 (2004). On July 9, 2008, the Regional Administrator for the Occupational Safety and Health Administration ("OSHA"), acting as agent for the Secretary of Labor ("Secretary"), dismissed as untimely the Complainant's complaint alleging retaliatory discharge under the provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes Oxley Act of 2002, 18 U.S.C. § 1514A ("SOX" or "Act"). OSHA based its determination on its finding that the Complainant received written notice of his dismissal on or about October 17, 2007, and the SOX complaint was filed on May 8, 2008, well beyond the 90-day statute of limitations period.[1]

On August 8, 2008, the Complainant filed an Appeal and Request for Formal Hearing with the Office of Administrative Law Judges ("OALJ"), objecting to the Secretary's findings. On August 19, 2008, I issued an Order to Show Cause directing the parties to demonstrate why the complaint should not be dismissed as untimely. On August 29, 2008, Complainant responded to the show cause order. On September 3, 2008, Respondent filed its response to the show cause order. On September 23, 2008, Respondent filed a reply to the Complainant's response to the show cause order.[2]

[1] OSHA's finding incorrectly states the complaint was filed on May 8, 2007, when it was actually filed on May 8, 2008. R. Resp. at Ex. B 2.

[2] On September 15, 2008, Respondent filed an unopposed motion seeking leave to file a reply to the Complainant's response to the show cause order. On September 16, 2008, the undersigned issued an Order granting Respondent's motion to file a reply.

I. Findings of Fact and Conclusions of Law

A. Factual Background

I am deciding this case without a hearing, and in the manner of a ruling on a motion for summary decision against Complainant. Therefore, I will accept all of the Complainant's factual allegations at this time as being true.[3]

In September 2007, Respondent's director of human resources, Patricia Lingen, informed Complainant that he was to remain at home with pay pending Respondent's investigation of alleged misconduct by the Complainant in accessing a confidential system. Complaint;[4] R. Resp. Attch. 1.[5]

Following his suspension, the Complainant sent an e-mail to Respondent on October 1, 2007, alleging Code of Conduct violations by Wyeth officials and explaining his allegedly improper conduct and asserting that the most recent personnel action against him was simply part of a continuing series of retaliatory actions by Wyeth. Complaint at 4; R Resp. Ex 1 ¶4.

On October 15, 2008, Respondent's human resources director, Ms. Patricia Lingen, sent a one page letter to the Complainant which states:

> Please note that the Company is reviewing the October 1, 2007 e-mail you sent in which you alleged Code of Conduct Violations and currently is investigating your allegations with respect to the Code of Conduct.
>
> The purpose of this letter is inform you that prior to receiving your October 1**,** 2007 e-mail, the Company had made the decision to terminate your employment based on your violation of company protocol by accessing a confidential system as an unauthorized user. You had been warned previously about respecting the confidentiality and security of electronic systems at Wyeth. Your October 1, 2007 e-mail does not address several key facts relating to this incident.

[3] I note the Complainant provided an abbreviated affidavit and the February 11, 2008 letter as evidence in support of his factual statements. The Respondent submitted an affidavit from the Human Resources Director, a copy of the October 15, 2007 and February 11, 2008 letters to the Complainant, as well as other documents.

[4] The Show Cause Order instructed OSHA to provide a copy of the complaint the Complainant filed with OSHA as it was not in the materials forwarded from OSHA to the Office of Administrative Law Judges. In response, OSHA submitted the letter dated May 8, 2008, from Complainant's counsel to Jennifer Nohl, an OSHA investigator alleging Complainant was terminated for whistleblower activities in violation of the Sarbanes-Oxley Act.

[5] As the Complainant's affidavit is brief, I deem the representations made by his counsel in the May 8, 2008 complaint to the OSHA investigator as admissions. Counsel states that from September 2007 through February 12, 2008, Complainant had been suspended with pay. Complaint at 2 (May 8, 2008 lttr).

Your e-mail does not respond to the fact that:

- The Company has you on videotape with Jim Capone at a security workstation between approximately 10:30 - 10:45 a.m. on August 23. At this time, Jim Capone maintained the security of the Cam Security system by logging into the computer with a secure password. He then allowed you to do the work you had suggested on the computer while he observed you.

- The Company has you on videotape by yourself at a security workstation at approximately 2:30 p.m. logging into the computer using the password that Jim Capone had to type in for you earlier that day. Jim Capone was not present at this time and Jim Capone has stated that he did not give you the password. In fact, earlier that morning, Jim Capone was logging in for you because you were not supposed to have the password. In addition, Jim Capone has stated that your log in to the system at approximately 2:30 p.m. was without his permission.

- When we confronted you about this second unauthorized log in, you insisted that you only logged in Jim Capone's presence. This is a direct contradiction to what the Company has on videotape.

If you would like to provide me with evidence in writing that addresses your specific behavior on August 23, 2007 and specifically addresses the three bullet points above, I would be happy to review it. In addition, if you would like to provide me with specific information in writing as to why you think your termination is not justified or specific details of the alleged "harassment" you feel you have received, I would be happy to review it. Please note that any communication with me on this subject must address the fact that the Company has videotape of your infraction.

If I do not hear from you, I will assume you have no information to provide and the Company will move ahead with your termination for misconduct.

R. Resp. at Ex A; Complaint at 4.

The Complainant responded to Ms. Lingen's letter.[6] Ms. Lingen stated that she received a letter from the Complainant dated October 19, 2007, alleging retaliation and harassment. R. Resp. at EX 1 ¶ 6; Complaint at 4. In the period from October 15, 2007 to February 2008, Wyeth contends it conducted an investigation regarding the allegations of retaliation and

[6] The Complainant's response was not appended to his submission and is not in the record. However, his complaint states that he responded by letter October 19, 2007, and explained "why the accusations made against him in September (about supposedly improperly accessing a secure system and related matters) were false, incorrect and pretextual." Complaint at 4.

harassment. R. Resp. Ex 1 ¶ 6. The Complainant was suspended with pay beginning in September 2007 to February 11, 2008. R. Resp. Ex 1 ¶3; Complaint at 2. Complainant states that he learned his employment was being terminated on February 12, 2008. He claims that prior to that date he had "no knowledge that my employment with Wyeth had been terminated or was going to be terminated." Compl. R. (Snyder Aff).

On February 11, 2008, Respondent sent Complainant a letter, which he received on February 12, informing Complainant that its investigation had not substantiated his claims and that Respondent "has concluded that the decision to terminate your employment is appropriate. Accordingly, the decision to terminate your employment will stand and your employment will be terminated effective February 11, 2008. Please see the following page regarding benefits information." R. Resp. Ex. B; Complaint at 6.

B. Parties' Contentions

Complainant argues that his claim of unlawful termination is timely. Compl. R. at 1-3. In support of his position, Complainant contends that the October 15, 2007 letter he received from the Respondent was simply a "threat" to terminate and that he was not terminated until February 11, 2008, when he was sent a letter which, he received on February 12, 2008, informing him of the termination. Mr. Snyder asserts that the "threat" to terminate contained in the October 15, 2007 letter, and the actual termination contained in the February 11, 2008 letter, are two discrete discriminatory acts which violate the whistleblower protection provisions of Section 806 of the Act. Comp. R. at 4. Therefore, Complainant argues each violation has its own, separate statute of limitations period, citing *Willis v. Vie Financial Group Inc*., 04-435 (August 6, 2004) 21 IER 1111, 2004 WL 1774575 (E.D.Pa.); *National Railroad Passenger Corporation,* 536 U.S. 101 (2002). Comp. R. 3-4. Consequently, Complainant maintains that because he was not terminated until February 11, 2008, the time period for filing a complaint on the termination began then and his complaint filed on May 8, 2008, is timely. In addition, Complainant argues that prior to February 12, 2008 he could not have initiated any legal action against his employer as his claim was not ripe. Comp. Appl. Lttr at 2. (Aug. 8, 2008).[7] Complainant further asserts that he cannot be expected to file a complaint against his employer alleging corporate ethical violations while still employed and while his job hangs in the balance. *Id*.

Respondent asserts that the claim is untimely and seeks dismissal. R. Resp. Respondent contends that the decision to terminate the Complainant was made in September 2007 and communicated to him on October 15, 2007. R. Resp. at 4. Respondent maintains the statute of limitations began to run on October 15 and argues that in order for the complaint to be timely Complainant was required to file by January 14, 2008. Respondent acknowledges that it reviewed the termination decision after October 15, afforded the Complainant an opportunity to provide it with information related to his misconduct and his allegations of improper conduct by Respondent's officials, and did not effect the termination until February 11, 2008. Respondent argues that these actions do not change the fact that the May 8, 2008 complaint was untimely. *Id*. In support of this contention, Respondent contends that under SOX, "[t]he statute of limitations begins to run when the employee is made aware of the employer's decision to

[7] Complainant's response to the order to show cause incorporates by reference his appeal letter of August 8, 2008.

terminate him or her even when there is a possibility that the termination could be avoided" citing *Lawrence v. AT&T Labs*, 2004-SOX-00065, 2004 DOLSOX Lexis 101, at 11 (ALJ Sept. 9, 2004) (citations omitted). *Id*. at 4. Respondent cites several decisions including *Del. State College v. Ricks*, 449 U.S. 250, 261 (1980) (holding the statute of limitations period begins when the employer's decision is made and the "pendency of a grievance, or some other method of collateral review of an employment decision does not toll the running of the limitations period") in support of its position that once the employee is informed of the decision to terminate, the statute of limitations commences even though there may be some further review of that decision with the possibility of reversal. (citations omitted). *Id*. at 4-5. Respondent also maintains that Complainant's assertion that he could not have initiated any legal action prior to February 12, 2008 as his claims were not ripe is error, as the clock begins to run on the date the employer communicates its intent to implement a termination rather than on the date the employee experiences the consequences of the adverse action. (citations omitted). R. Resp. at 6-7. Finally, Respondent challenges Complainant's contention that he should not be expected to file a complaint against his employer alleging serious violations while he is still employed. R. Resp. at 8. In its reply to Complainant's response to the show cause order, Respondent asserts that its post-investigation decision to uphold its previous decision to terminate the Complainant was not an independent, discrete act of discrimination which started a new 90-day clock running. Reply at 2-3.

C. Discussion

Section 1514A(b)(2)(D) provides that an action shall be commenced not later than 90 days after the date on which the violation occurs. 18 U.S.C. § 1514A(b)(2)(D). The regulation implementing this statutory provision, 29 C.F.R. § 1980.103(d) provides:

> (d) Time for Filing. Within 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), and employee who believes that he or she has been discriminated against in violation of the Act may file…a complaint alleging such discrimination…

In explaining the regulation, the Department of Labor stated:

> [T]he alleged violation…is considered to be when the discriminatory decision has been both made and communicated to the complainant. (Citing *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). In other words, the limitations period [i.e., the 90 days] commences once the employee is aware or reasonably should be aware of the employer's decision. *Equal Employment Opportunity Commission v. United Parcel Service*, 249 F.3d 557, 561-62 (6th Cir. 2001)….

69 Fed. Reg. No. 163, p. 52106 (August 24, 2004).

In *Ricks*, the Supreme Court held that a Title VII claim alleging unlawful denial of tenure was untimely as it was not filed within the limitations period following the date the tenure decision was made and communicated to the employee even though the effect of the denial of

tenure decision, that is, the loss of a teaching position did not occur until later. 449 U.S. at 258. As the complaint alleged that the tenure denial decision was discriminatory and did not allege a continuing violation, the focus is on the time of the discriminatory act and not the time at which the consequences of the discriminatory acts are felt. *Id.*

Applying the *Ricks* precedent, the Department of Labor's Administrative Review Board ("ARB") and several Administrative Law Judges have dismissed as untimely SOX complaints filed more than 90 days after termination decisions were communicated to the affected employee. *See Levi v. Anheuser Busch Cos.* Inc., ARB Case Nos. 06-102, 07-020, 08-006; ALJ Nos. 2006-SOX-037, 2006-SOX 108, 2007-SOX, 055, 2008 DOL Ad. Rev.Bd.Lexis 46 at 22 (ARB Apr. 30, 2008) (statute of limitations commenced on date employee has notice of indefinite suspension with intent to discharge and not on later date when he had exhausted the arbitration process and the termination was final and effective); *Lawrence v. AT&T* Labs, 2004-SOX-00065, 2004 DOLSOXLEXIS 101, at 11 (ALJ Sept. 9, 2004) (statute of limitations begins to run on date complainant "is made aware of the employer's decision to terminate him or her even when there is a possibility that termination could be avoided."); (*Piles v. Lee Hecht Harrison, LLC*, Case Nos. 2005-SOX-00055, 2005-SOX-00056, 2005 DOLSOXLEXIS 80 at 21 (ALJ Nov. 8, 2005) (limitations period commences when complainants' received notice their positions were eliminated and post termination investigation of whistleblowing complaints did not toll the 90-day statutory limitations period).

The Complainant's argument against dismissal of the claim here, that there are two independent and discrete acts of discrimination, each having its own 90-day limitations period, is unpersuasive as it is contrary to controlling precedent discussed above. Complainant's reliance upon *Willis* to support his argument is misplaced. In *Willis* the plaintiff filed a complaint under SOX alleging his employer retaliated against him by threatening to terminate him and removing his job responsibilities. Thereafter, the plaintiff was terminated. The Court held the plaintiff could not pursue a retaliatory discharge claim as he had not filed a complaint regarding the discharge nor had he amended his complaint to include his discharge. The court held that the administrative exhaustion requirement in SOX precludes recovery for a discrete act of retaliation that arose after the filing of the administrative complaint but was never presented to the administrative agency for investigation. 2004 WL 1774575*3-6.

Unlike *Willis*, in which there were two discrete discriminatory acts, a threat to terminate and later a termination, in the present matter Respondent did not threaten to terminate Complainant before his termination. Rather, Respondent decided to fire the Complainant in September 2007 and informed him of that decision by letter dated October 15, 2007, detailing the specific misconduct. The Respondent's letter also acknowledged receipt of Complainant's e-mail alleging retaliation and harassment and instructed Complainant to provide any information he wished Respondent to consider in addressing the specific misconduct Respondent identified, as well as any information to support his claim of retaliation and harassment. The Respondent's act of affording the Complainant an opportunity to provide the company with information regarding his alleged misconduct, which the company would review, does not convert its decision to terminate Complainant, communicated in the October 15, 2007 letter, into a threat to terminate. Rather, the company was willing to review its termination of Complainant by considering information he might have, similar to an arbitration or grievance procedure which

might reverse an adverse employment action. Under *Ricks* and its progeny, the 90-day limitations period for filing a SOX complaint is not stayed pending an internal review of the decision. Accordingly, the controlling date for commencement of the 90-day limitations period for Complainant's termination, was the date Respondent informed the Complainant of its decision to discharge him, and is not the date the termination became effective. As Complainant was notified of the decision to terminate him on October 15, 2007, and he failed to file his complaint within 90 days, the complaint is untimely.[8]

II. Conclusion

Based upon the forgoing, I find that the complaint filed on May 8, 2008, is barred by the 90-day statute of limitations in Section 1514A(b)(2)(D) of the Sarbanes-Oxley Act. 18 U.S.C. §1514A(b)(2)(D). The limitations period began to run several months before the complaint was filed, when the Complainant was informed on October 15, 2007, that the company had decided to terminate his employment.

III. ORDER

It is Ordered that the complaint herein is dismissed.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

[8] I am sympathetic to Complainant's policy argument that requiring him to file a complaint while his job hangs in the balance presents difficulties, however the Supreme Courts rejected this argument in *Ricks*.

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).