U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 October 2009

Case No.: 2009-SOX-00061

In the Matter of:

DALE B. ADAMS,
Complainant,

v.

TYSON FOODS, INC.,
Respondent.

ORDER DISMISSING COMPLAINT

This matter arises out of a complaint filed by Dale B. Adams ("Complainant") against Tyson Foods, Inc. ("Respondent"), under 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 USC § 1514A ("SOX" or the "Act"). The statute and implementing regulations (appearing at 29 C.F.R. Part 1980) prohibit retaliatory actions by publicly-traded companies (and their subsidiaries or agents) against employees who (1) provide information to their supervisors, federal regulatory or law enforcement agencies, or Congress, relating to activities that they reasonably believe to constitute violations of certain specified federal criminal statutes, any Securities and Exchange Commission regulations, or federal laws relating to fraud against shareholders, or (2) assist in investigations or proceedings relating to such activities.

PROCEDURAL HISTORY

On June 18, 2009, Complainant filed a complaint with the Secretary of Labor alleging that Respondent discriminated against him in violation of SOX. The complaint was then transferred to the Occupational Safety and Health Administration (OSHA). The Regional Administrator for OSHA dismissed the complaint as untimely on July 15, 2009. Complainant filed a request for a hearing before an administrative law judge by letter, dated August 7, 2009.

On August 17, 2009, I issued an order directing Complainant to show cause, within 20 days of the date of the order, why his complaint should not be dismissed for failure to state a claim upon which relief can be granted. On August 25, 2009 and September 9, 2009, Complainant filed two responses to the Order to Show Cause. Additionally, on August 31, 2009, Complainant filed a Motion for Injunction, requesting that the Court prevent Respondent from transferring certain employees involved in this claim, allegedly in order to interfere with investigation in this case. Complainant filed additional documentation on September 14, 2009,

September 16, 2009, and September 26, 2009, all of which were received past the deadline set forth in the Order to Show Cause. Complainant contacted this office in order to ascertain whether the documents were received and was reminded of this deadline. Taking into account Complainant's *pro se* status, I have not held him to the same evidentiary standards as those parties under representation. As such, I have considered the additional documents as supplements to his response to my order. After reviewing Complainant's multiple responses, I find that Complainant failed to state a claim upon which relief can be granted under the Act. Thus, his claim must be dismissed.

FACTUAL BACKGROUND [1]

Complainant began employment with Respondent in November of 2008. Complainant alleges that Respondent suspended him on March 10, 2009 in retaliation for telling a coworker of his intention to inform the U.S. Department of Agriculture ("USDA") that Respondent was allowing condemned chickens to be sold. Complainant provided affidavits from two co-workers, Glen Self and Thomas Paradiso, which state that after Complainant informed Mr. Paradiso that he intended to file a complaint against Respondent, Mr. Paradiso conspired with a supervisor, Toby Shearer and a human resources representative, Debbie Trost, to either suspend or terminate Complainant. According to Mr. Paradiso, he helped Mr. Shearer "catch" Complainant in possession of a cell phone, which was in violation of the company's rules of conduct. As a result of this incident, Complainant was suspended for three days.

Complainant alleges that after his return to work, he was continually harassed by his supervisors. Shortly after Complainant's suspension, he notified Mr. Paradiso that he intended to file a complaint against Respondent with the Equal Employment Opportunity Commission ("EEOC") because he felt he was being treated unfairly. Complainant alleges that in response to this announcement of his intention to file a complaint, Mr. Paradiso, Mr. Self, Mr. Shearer, and Ms. Trost conspired again to create a situation where Complainant would be terminated. This original plan was not executed but eventually, on May 28, 2009, Claimant's employment with Respondent was terminated.

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.

[1] In reaching my conclusion in this matter, I have assumed the truth of the allegations in the Complaint, in Complainant's objections to the decision of the Regional Administrator, and in his several responses to my Order to Show Cause.

Courts have the inherent power to take such action, or to find that a complaint is frivolous on its 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 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. 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 state a claim under the employee-protection provisions of the Act, a complainant must allege 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).

C. DISCUSSION

a. Protected Activity

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). As discussed above, a "protected activity" under the Act consists of providing information regarding violations of certain criminal and/or securities laws to specified parties. In Complainant's various submissions, he has identified two communications that may qualify as protected activities: informing a co-worker that he intended to file a report with the USDA that Respondent was allowing condemned chickens to be sold, and, after a suspension, informing a co-worker that he intended to file a complaint with the EEOC.

In order for a communication to qualify as a "protected activity," the Complainant must show that his communication to the employer was specifically related to one of the laws specified in the Act. Both the Fourth and First Circuits have held that Complainant must hold both a subjective and objectively reasonable belief that his conduct constituted a violation of that specified law. *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009); *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008). Additionally, the complaint must "definitively and specifically" relate to one of the laws identified in the Act. *Godfrey v. Union Pacific Railroad Co.*, ARB No. 08-088, ALJ No. 2008-SOX-005 (ARB July 30, 2009). Those laws include 18 USC §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. 18 USC § 1514A; *Godfrey, supra,* ARB No. 08-088, slip op. at p. 4.

After review of Complainant's original complaint as well as his other filings, I find that neither of his communications to his co-workers was specifically related to any of the laws set forth in the Act; instead, they related to food-safety and equal-opportunity issues, neither of which falls within the Act's purview. Although he refers to the Act in his filings, and states that a violation occurred, he does not state with any specificity what laws he felt were being violated. Thus, he has failed to show that his activities qualify as "protected activities" under the fact.

CONCLUSION

Complainant's claim fails to state a claim on which relief can be granted, and must be dismissed on that basis.

Complainant's Motion for Injunction is also denied as his claim has been dismissed and the motion is now moot.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. That Complainant's motion for injunction is DENIED; and
2. That Complainant's Complaint is DISMISSED.

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).