U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 31 January 2012

CASE NO: 2009-SOX-00001

IN THE MATTER OF

LAURA BUTLER,
Complainant

v.

ANADARKO PETROLEUM CORPORATION,
Respondent

DECISION AND ORDER ON REMAND DISMISSING COMPLAINT AS UNTIMELYAND DISMISSING COMPLAINT FOR FAILURE TO PARTICIPATE IN DISCOVERY

This matter arises under the employee protection provisions of the Sarbanes-Oxley Act of 2002, (the Act or SOX), 18 U.S.C. § 1514A, and its implementing regulations, 29 C.F.R. Part 1980, brought by Laura J. Butler (Complainant) against Anadarko Petroleum Corporation (Respondent). Complainant alleges Respondent terminated her employment as a result of engaging in activities which are protected under the Act.

On December 30, 2008, this Court dismissed the complaint as untimely filed. The Court found Complainant was fired from her employment on May 22, 2006 and filed her complaint with the U.S. Department of Labor on December 15, 2006. Complainant argued that the time for filing of her complaint should be tolled because she filed the precise statutory claim in issue but did so in the wrong forum (the FBI and with the U.S. District Court). This Court held equitable tolling was not applicable as Complainant cannot be said to have filed the precise statutory claim in issue in the wrong forum. Accordingly, the Court dismissed the complaint as untimely.

Complainant appealed the decision to the Administrative Review Board (ARB). On February 17, 2011, the ARB issued a Final Decision and Order of Remand. The ARB found that because Complainant was fired in May 2006, the OSHA complaint she filed on December 15, 2006 was untimely on its face. At issue before the ARB was whether Complainant's failure to timely file her complaint should be excused under the principle of equitable tolling.

The ARB affirmed the Court's finding that Complainant failed to invoke the standard for equitable tolling as to the FBI filing. As to the District Court filing, the ARB found that it did

amount to the precise statutory claim as was filed with OSHA. The ARB held this Court "erred in not considering the July 31 district court complaint a valid SOX complaint for purposes of tolling. Because the ALJ did not have the benefit of all the facts, we limit our holding to the ALJ's consideration of the July 31 complaint. We make no additional findings on Butler's equitable tolling of the filing deadlines and remand for further proceedings. On remand and consistent with this Order, the parties may further adjudicate equity issues based on newly discovered evidence not addressed in this Order."

The following pleadings have been filed with the Court since the BRB's Remand:

1. Respondent's Motion to Dismiss For Complainant's Failure to Participate in Discovery (ALJ 1)
2. Complainant's Response to Respondent's Motion to Dismiss (ALJ 2)
3. Respondent's Reply to Complainant's Response to Respondent's Motion to Dismiss (ALJ 3)
4. Complainant's Motion For Summary Judgment and Brief in Support (ALJ 4)
5. Respondent's Response to Complainant's Motion for Summary Judgment (ALJ 5)
6. Complainant's Reply to Respondent's Response to Complainant Motion for Summary Judgment (ALJ 6)
7. The Court's Order Denying Complainant's Motion for Summary Decision and Respondent's Motion to Dismiss (ALJ 7)
8. Complainant's Appeal and Response to Amended Notice of Oral and Videotaped Deposition and Subpoena Duces Tecum (ALJ 8)
9. Respondent's Motion to Dismiss (ALJ 9)
10. The Court's Order to Show Cause (ALJ 10)
11. Complainant's Response to Respondent's Motion to Dismiss (ALJ 11)
12. Reply to Response to Motion to Dismiss (ALJ 12)
13. Complainant's Memorandum in Response to the December 12, 2011 Order to Show Cause (ALJ 13)
14. Response to Complainant's Memorandum in Response to the Order to Show Cause (ALJ 14)
15. Complainant's Amended Motion for Summary Judgment and Brief in Support (ALJ 15)
16. Respondent's Response to Complainant's Amended Motion for Summary Judgment (ALJ 16)
17. Complainant's Reply to Respondent's Response to Complainant's Response to the Order to Show Cause (ALJ 17)

On August 22, 2011, this Court issued a Notice of Hearing and Pre-Hearing Order which required all discovery to be completed on or before October 11, 2011. Respondent served Complainant by certified mail with a Notice and Subpoena requiring her to produce document and appear for deposition on September 30, 2011. (ALJ 1, EX 2). Complainant failed to appear for the deposition and produce the requested documents. (ALJ 1, EX 8). On October 4, 2011, Respondent received by way of returned mail the Notice and Subpoena indicating it was returned to sender, undeliverable with no forwarding address. (ALJ 1, EX 10).

On October 12, 2011, the Respondent filed a Motion to Dismiss For Complainant's Failure to Participate in Discovery (ALJ 1) and Claimant filed a Response. (ALJ 2). A conference call was held on October 20, 2011 to discuss the matter. It was determined by the Court that the Notice and Subpoena were sent to the correct address but Claimant chose to not pick up her mail. During the telephone conference the Parties agreed to reschedule the deposition for November 30, 2011. Complainant did not indicate any reason she would be unable to attend the deposition and Complainant assured the Court that she would attend the deposition. Further, during the telephone conference, the Court and the Parties discussed and the Court specifically ordered Complainant to produce the documents in Request Nos. 2, 5, 6, 7, 10 and 11. As Complainant's deposition had now been scheduled and discovery was proceeding, Respondent's Motion to Dismiss for Complainant's Failure to Participate in Discovery was denied. (ALJ 7).[1]

On November 23, 2011, the Court received Complainant's Appeal and Response to Amended Notice of Oral and Videotaped Deposition and Subpoena Duces Tecum (ALJ 8). Therein, Complainant notified the Court that she would "not be appearing for a videotaped deposition because she fears Respondent will divulge her identity via videotape to those persons (similar to those seen in the cars outside her house) who would do her bodily harm." Complainant had not advised the Court of any fears during the conference call in which the deposition was set and provided no further information with ALJ 8. The Court set up a telephone conference call for November 23, 2011, but Complainant was not available at the set time. The Court left a telephone message with Complainant that the Court expected her to attend the deposition. Shortly thereafter, Complainant contacted the Court's staff. Complainant stated she was not going to attend the deposition because it was too close to the holidays. She was instructed that she must attend the deposition as scheduled on November 30, 2011. Complainant did not appear for the November 30, 2011 deposition and did not fully respond to the subpoena *duces tecum* as ordered by the Court. (ALJ 9, EX 6).

DISCUSSION

29 C.F.R. subsection 18.6(d)(2)(v) gives an administrative law judge the authority to render a decision against a party who fails to comply with an order. It states:

> If a party or an officer or agent of a party fails to comply with a subpoena or with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following: . . .

[1] The Court received ALJ 3 after the October 20, 2011 conference call. Apparently while the case was in U.S. district court Complainant had failed to appear for deposition in 2007 despite that Court's Order to attend the deposition. (ALJ 3, EXs B, C, D, E)

> (v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

29 C.F.R. 18.6(d)(2)(v). This power is essential to an ALJ's management of a case. In ***Supervan, Inc.***, the Administrative Review Board explained:

> If an ALJ is to have any authority to enforce prehearing orders, and so to deter others from disregarding these orders, sanctions such as dismissal or default judgments must be available when parties flagrantly fail to comply. . . . . The *Aiken* rationale must be applied to all situations involving flagrant non-compliance with discovery requests and orders. To hold otherwise would render the discovery process meaningless and vitiate an ALJ's duty to conclude cases fairly and expeditiously.

***Supervan*,** ARB No. 00-008, ALJ No. 94-SCA-14 (Sept. 30, 2004) (quoting *Cynthia E. Aiken,* BSCA No. 92-06 (July 31, 1992)); *see also Powers v. Pinnacle Airlines, Inc.*, ARB No. **05-022, ALJ No. 2004-AIR-32 (Jan. 31, 2006)**. However, dismissal is a severe sanction, and is usually reserved for flagrant or *repeated* violations of orders. *See Supervan*, ARB No. 00-008.

Furthermore, the authority to dismiss a case also comes from an ALJ's inherent power to manage and control his or her docket and to prevent undue delays in the orderly and expeditious disposition of pending cases. *See Link v. Wabash Railroad Co*., 370 U.S. 626 (1962).

Here, Complainant has repeatedly refused to attend properly scheduled depositions. Respondent has been attempting to depose Complainant since 2006. (ALJ 3, EXs B – E). But for Complainant's refusal to pick up her certified mail, her deposition would have been taken in September 2011 and the case could have proceeded to hearing as scheduled. At the October 20, 2011 conference call, the Court did not leave it to the Parties to later schedule the deposition. The Court made the Parties check their schedules and availability and established the scheduled time, date and place the deposition was to take place. Complainant was aware that the deposition was to be videotaped as noted in Respondent's Motion to Dismiss (ALJ 1, EX 8) which was received by Complainant on October 11, 2011. (ALJ 2). Complainant assured the Court that she would be at the deposition and would comply with the subpoena as specifically directed by the Court.

Because Complainant has violated my express orders, and because those violations are flagrant, repeated, and prejudicial to Respondent, I find it just to dismiss Complainant's complaint pursuant to subsection 18.6(d)(2)(v).

Finally, I find that Complainant's repeated failure to comply with my orders and deadlines is causing undue delay to the orderly and expeditious disposition of this case and

others pending in my docket. I also dismiss the claim under my inherent authority to do so in order to manage and control my docket. *See Link*, 370 U.S. 626 (1962).

Also before the Court is the issue of whether the complaint was timely filed. Despite the BRB's direction that "the parties may further adjudicate equity issues based on newly discovered evidence not addressed in this Order" Complainant has refused to engage in discovery. However, the attachments to the filed pleadings indicate Complainant was been represented by counsel throughout the statutory period. As early as March 9, 2006, Attorney Coulter wrote "Ms. Lormand has a claim of potential whistleblowing violations under the Sarbanes-Oxley Act." On April 11, 2006, Attorney Coulter stated she was ready to mediate the matter. (ALJ 15). Complainant was represented by two attorneys when she filed her complaint in district court on July 31, 2006. (ALJ 1, EX 1). She continued to be represented at least until at least June 2007. (ALJ 3, EXs B – E).

A complainant's ignorance of the law does not compel equitable tolling, especially in a case where a party is represented by counsel. *See Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022 (ARB Dec. 30, 2005). The fact that a complainant and her legal counsel might not know of the need to file a SOX complaint with the Secretary of Labor within 90 days of the alleged violation is not a ground for tolling the statute of limitations. Complainant bears the burden of justifying the application of equitable modification principles. In considering whether attorney error constitutes an extraordinary factor for tolling purposes, the Board has consistently held that it does not because ultimately, clients are accountable for the acts and omissions of their attorneys. *Higgins v. Glen Raven Mills, Inc*., ARB No. 05-SDW-143 (ARB Sep. 29, 2006); *Steffenhagen v. Securitas Sverige, AR*, ARB No. 03-139, ALJ No. 03-SOX-024, slip op. at 4 (ARB Jan. 13, 2004); *Kent v. Barton Protective Service*, 84-WPC-1 (Sec'y Sep. 28, 1990) citing *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978) "once a complainant consults an attorney he has access to a means of acquiring knowledge of his rights and responsibilities, precluding application of equitable tolling considerations." In *McCrimmons v. CES Environmental Services*, ARB No. 09-122 (ARB Aug 31, 2009), the Board stated "We note that we agree with the principle of law as stated by the Secretary who has held that "[e]quitable tolling is inappropriate when [complainant] has consulted counsel during the statutory period . . ." I find there are no sufficiently rare circumstances to support the application of equitable tolling in this case where Complainant was represented by counsel throughout the applicable filing period. *See Granger v. Aaron's Inc.*, 636 F.3d 708 (5th Cir. 2011).

DECISION AND ORDER

For the reasons stated above:

IT IS ORDERED that, pursuant to 29 C.F.R. 18.6(d)(2)(v), Respondent's Motion to Dismiss is **GRANTED** and the complaint is **DISMISSED FOR FAILURE OF COMPLAINANT TO PARTICIPATE IN DISCOVERY.**

IT IS ORDERED that the complaint herein was untimely and is hereby **DISMISSED**.

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LARRY W. PRICE
ADMINISTRATIVE LAW JUDGE