



**Issue Date: 19 June 2009**

Case No.: 2009-SOX-00044

In the Matter of:

CHELSEA ELIZABETH GREENE, *pro se*,

Complainant,

v.

OMNI VISIONS, INC.,

Respondent.

### **ORDER OF DISMISSAL**

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A<sup>1</sup>, and its implementing regulations found at 29 CFR Part 1980. Section 806 provides “whistleblower” protection to employees of publicly traded companies against discrimination by employers in the terms and conditions of employment because of certain “protected activity” by the employee.

The Complainant filed this current complaint on March 26, 2009. The complaint was denied by the Regional Administrator, Occupational Safety and Health Administration, Atlanta, Georgia, on April 10, 2009. The Complainant filed a request for hearing before an Administrative Law Judge on April 14, 2009.

In her current complaint the Complainant alleges that on June 6, 2006, she was terminated from her job as a regional director for Respondent in Asheville, North Carolina in retaliation for refusing to participate in actions she deemed unlawful; collecting evidence of fraudulent activities by Respondent; reporting Medicaid fraud to her supervisors, state authorities and federal authorities; and participating in an investigation of allegations made to outside authorities. The Complainant seeks reinstatement to her past employment along with back pay,

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<sup>1</sup> VIII of the SOX is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, the employee protection provision, protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio and television 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.

scheduled pay raises and stock options, retirement pay adjustments, letters of apology and employment reference, and additional monetary damages. The Complainant also seeks an Order of Abatement, posting of the Administrative Law Judge Decision and Order, and an Order establishing a college scholarship for all children who received Medicaid benefits while in foster care through Respondent's organization.

By Order issued June 1, 2009, the Parties were directed to show cause why the case should not be dismissed for late filing.

On June 16, 2009, Complainant filed her response. She asserts that the case should not be dismissed because (1) the "False Claims Act"<sup>2</sup> protects whistleblowers who report fraud involving government money, including Medicaid funds; (2) an order from Judge L. Thornburg sealing the filing of a False Claims Act allegation for 60 days was violated; (3) she was disadvantaged when her attorney withdrew in her False Claims Act claim and she filed a voluntary dismissal of the case before Judge L. Thornburg, though she believes the case is "alive [and] belonging to the United States"; (4) it is questionable if a subpoena for records was served in the False Claims Act case; (5) the government investigation into alleged Medicaid fraud was stopped without her knowledge; (6) the issue of "wrongful termination was attached as a third cause of action to the qui tam" in the False Claims Act case; (7) she relied on her attorney for guidance prior to his withdrawal from the False Claims Act case; (8) the period for filing the current complaint should be tolled because of far reaching consequences impacting on "government waste and the lives and services to foster children attached to a Medicaid number; (9) there has been "more than \$138 million dollars in Medicaid/Mental Health fraud" in North Carolina over the past two years; (10) there is a moral obligation to children in foster care; (11) the "Whistle Blowers Act", First Amendment of the United States Constitution, and the Civil Rights Act provide additional protections; (12) the Administrative Procedure Act allows for alternate means of dispute resolution; and (13) "I believe Omni Visions, Inc., President ... might have some remorse."

## DISCUSSION

Title 18, U.S. Code, § 1514A, the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 provides that:

"(a) ... No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, suspend, threaten, harass, or in any manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

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<sup>2</sup> The Complainant pursued her complaints of Medicaid fraud through the False Claims Act, 31 USC §3729, et. seq., by filing a complaint in the U.S. District Court for the Western District of North Carolina on January 5, 2007; USDC (WD, NC) civil action 1:07cv9. The Department of Justice declined to intervene in the matter. On October 16, 2007, the Complainant filed a Notice of Voluntary Dismissal with the Court.

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio and television fraud], 1344 [bank fraud] or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –

- (A) a Federal regulatory or law enforcement agency;
- (B) any Member of Congress or any committee of Congress; or
- (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341 [mail fraud], 1343 [wire, radio and television fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

...

(b)(2)(D) Statute of Limitations – An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

...

(c)(2) Compensatory damages – Relief for any action under paragraph (1) shall include –

- (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
- (B) the amount of back pay, with interest; and,
- (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.”

Federal Regulations at Title 29, Code of Federal Regulations, Chapter XVII, Part 1980, sets for the procedures for the handling of discrimination complaints under Section 806 of SOX. A complaint must be dismissed unless the complainant makes a prima facie showing that: (1) the complainant engaged in protected activity or conduct; (2) the respondent knew that it engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action. 29 CFR § 1980.104(b). Neither the determination to dismiss a complaint without completing an investigation pursuant to 29 CFR § 1980.104(b) nor the determination to proceed with an investigation by the Occupational Safety and Health Administration is subject to review by the Administrative Law Judge and the complaint may not be remanded for completion of an investigation or for additional findings on the basis that a

determination to dismiss at the Occupational Safety and Health Administration level was made in error. 29 CFR § 1980.109(a).

A complaint filed under SOX need not be in any particular form but it “must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.” 29 CFR § 1980.103(b) The complaint **must** be filed “within ninety (90) days after an alleged ... discriminatory decision has been made and communicated to the complainant.” 29 CFR § 1980.103(c) Where the complaint is not filed within ninety (90) days of the adverse personnel action, the complainant is barred from redress under the Act. 18 USC §1514A(b)(2)(D); *Johnson v. Stein Mart, Inc.*, 2007 WL 1796265 (USDC, M.D. FL, June 20, 2007) unpub.

Under SOX, this Administrative Law Judge has no jurisdiction to adjudicate complaints under the False Claims Act (31 USC §3729, et. seq.), Medicaid statutes or the Civil Right Act (42 USC §1981 et seq.). Accordingly, Complainant’s implication that this Administrative Law Judge may address her concerns under those statutes is misplaced and her reliance on those statutes to pursue her current complaint are not addressed herein. Accordingly, her reasons not to dismiss this SOX case, as set forth in reasons numbered 1, 2, 4, 5, 11, and 12 are without merit.

Here the Complainant alleges an adverse personnel action under SOX on June 6, 2006, and filed her complaint under SOX on March 26, 2009. This is a period of 1,024 days, well past the 90-day period permitted to file a cause of action under SOX. However, the SOX filing limitation period is not jurisdictional and is therefore subject to equitable tolling. In order for the 90-day period to be tolled, the Complainant must establish (1) she was actively misled by Omni Visions, Inc., as related to her SOX cause of action; (2) the Complainant was prevented from asserting her rights under SOX by some extraordinary manner; or (3) the Complainant has raised the precise statutory SOX cause of action but mistakenly did so in the wrong forum. *Corbett v. Energy East Corp.*, ARB No. 07-044, ALJ No. 2006-SOX-065 (ARB, Dec 31, 2008); *Harvey v. Home Depot U.S.A., Inc.*, ARB No. 04-115, ALJ Nos. 04-SOX-20, 36 (ARB, June 2, 2006); and the cases cited therein.

Complainant essentially states that one of her reasons for late filing was because of advice received from her attorney, or lack thereof, during his involvement in the False Claims Act claim. That is, the attorney should have advised her of the remedies availability under SOX regulations but failed to do so thus preventing her from timely filing a SOX complaint. The U.S. Supreme Court in *Pioneer Investment Services Co. v. Brunswick Assocs Ltd. P’ship*, 507 U.S. 380 (1993), rejected the argument that a client should not be held responsible for the errors and omissions of retained counsel. The Administrative Review Board in *Moldauer v Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 03-SOX-026 (ARB, Dec. 30, 2005), applied the Court’s logic to hold that the consequences of a retained counsel’s knowledge or lack of knowledge of SOX must be borne by the client. Thus the advice received or not received from her retained counsel regarding SOX filings is attributed to the Complainant and does not excuse her late filing in this case. (see also *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-23 (ARB, Sept. 29, 2006) dicta that “ignorance of the law will generally not support a finding of entitlement to equitable tolling.”)

The Complainant also proffers that her adverse personnel action under SOX was addressed as a third cause of action in her False Claims Act filing, such that she actually filed a complaint under SOX in the wrong forum well before the March 24, 2009 date. In order for her filing in Federal District Court under the False Claims Act to be considered a filing under SOX in the wrong forum, the Complainant must establish that a precise complaint under SOX was filed. This requires that the document actually filed demonstrates the Complainant engaged in SOX protected activity prior to her termination of employment and the information she provided to Omni Visions, Inc. regarding management's activities created the reasonable believe on her part that the conduct constituted mail, wire, radio, television, bank or security fraud; or violated any rule or regulation of the Securities Exchange Commission; or violated any provision of federal law relating to fraud against shareholders. The mere possibility that a challenged management action could adversely affect the financial condition of the company and would in turn be withheld from public shareholders is not enough. *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-23 (ARB, Sept. 29, 2006); *Harvey v. Home Depot U.S.A., Inc.*, ARB No. 04-115, ALJ Nos. 04-SOX-20, 36 (ARB, June 2, 2006)

A copy of the "Complaint Filed in Camera and Under Seal" filed under the False Claims Act with the Federal District Court by the Complainant was submitted with her request for formal hearing. The "Third Cause of Action" referred to by the Complainant as a filing in the wrong forum is set forth in pertinent part as follows:

"THIRD CAUSE OF ACTION  
(Wrongful Discharge of the Relator)

38. The Plaintiff-Relator realleges and incorporates by reference the allegations in paragraphs 1-37 set forth above.
39. This is a claim for wrongful discharge of the Plaintiff-Relator [Complainant] by the Defendant pursuant to the False Claims Act, 31 U.S.C. § 3730(h).
40. The Plaintiff-Relator entered upon the Defendant's employment as Regional Director for the Mountain region on or about April 1, 2006.
41. Over the course of the next one and one-half months the Plaintiff-Relator obtained personal and direct knowledge of the facts underlying the above cause of action and posted the erroneous information to her employer's knowledge and attempted to correct the Defendant's illegal business practices advising management of her concerns over the unsubstantiated and undocumented billing claims.
42. The acts of the Plaintiff-Relator while employed by the Defendant as identified herein were acts in furtherance of a possible action under the False Claims Act by her attempt to stop the Defendant from continuing its fraudulent conduct and make public disclosure of same.
43. On or about June 6, 2006, subsequent to the aforementioned acts, the Defendant terminated the Plaintiff-Relator's employment."

The Complaint was filed in Federal District Court on January 5, 2007, which is 213 days after her employment was terminated. Referenced allegations 1 through 37 set forth jurisdictional matters under the False Claims Act; the Defendant's alleged Medicare and Medicaid health service, record keeping, and billing practices; the Defendant's alleged improprieties in the area

of foster care placement, supervision, and billing practices; and alleged misuse of state grant monies related to increasing the state foster parent pool. In her “Prayer for Relief” in the complaint, the Complainant sought “an amount in excess of \$10,000 for Defendant’s retaliatory actions against the Plaintiff-Relator under the ‘whistle blower’ provisions of the False Claims Act 31 U.S.C. § 3730(h).”

Examination of the Complaint filed in Federal District Court on January 5, 2007, fails to demonstrate that the Complainant put Omni Visions, Inc., on notice that the Complainant reasonably believed that the Defendant’s alleged actions constituted mail, wire, television, bank or securities fraud, or violated any rule or regulation of the Securities Exchange Commission, or violated any provision of Federal law relating to fraud against shareholders. The complaint demonstrates that the Complainant was proceeding only under the False Claims Act. Accordingly, this Administrative Law Judge finds that the Complainant has failed to establish that the complaint filed in Federal District Court on January 5, 2007, constituted a SOX complaint filed in the wrong forum.

The Complainant argues that her complaint should not be dismissed because of very serious issues involving such things as the far reaching consequences impacting on “government waste and the lives and services to foster children attached to a Medicaid number, the “more than \$138 million dollars in Medicaid/Mental Health fraud” in North Carolina over the past two years, and a moral obligation to children in foster care. The argument that a company’s actions are so serious that no limitation period for filing should apply has been addressed and rejected as grounds for equitable tolling of the 90-day filing requirement. To permit the “severity of the alleged violations” to warrant equitable tolling would result in the 90-day filing limitation period to have no legal force. *Ubinger v. CAE International*, ARB No. 07-083, ALJ No. 2007-SOX-036 (ARB, Aug. 27, 2008) This Administrative Law Judge finds that the “serious” reasons for not dismissing the complaint are not sufficient to toll the 90-day filing period.

Finally, the Complainant’s belief that the President of Omni Visions, Inc., “might have some remorse” is insufficient to establish that she was actively misled by the Defendant into not filing a timely SOX complaint. Review of all the documents submitted by the Complainant fails to establish that actively misled in a SOX matter.

### **FINDINGS OF FACT**

After deliberation on all the documents submitted by the Complainant, this Administrative Law Judge finds that:

1. The Complainant was employed as a Regional Director by the Defendant beginning on or about April 1, 2006.
2. The Complainant’s employment was terminated on June 6, 2006.
3. The Complainant filed her current SOX complaint on March 26, 2009.

4. The Complainant filed a complaint in the Federal District Court on January 5, 2007, under the False Claims Act.
5. The Complainant alleged in part, in her complaint filed in the Federal District Court, that her employment had been wrongly terminated in violation of the False Claims Act “whistle blower” protection provisions set forth at 33 U.S.C. § 3037(h).
6. The Complainant failed to establish that the complaint filed in Federal District Court constituted a SOX complaint filed in the wrong forum.
7. The Complainant failed to establish that she was prevented from asserting her rights under SOX by an extraordinary event.
8. The Complainant failed to establish that she was actively misled as related to a SOX action arising from her June 6, 2006, employment termination.
9. The Complainant is not entitled to a period of equitable tolling of the SOX statutory 90-day filing limitation.
10. The Complainant failed to file her current SOX complaint in a timely manner.

### **ORDER**

**It is hereby ORDERED** that the Complainant’s SOX complaint filed March 26, 2009, is **DISMISSED** due to untimely filing of the complaint.

A

ALAN L. BERGSTROM  
Administrative Law Judge

ALB/jcb

**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).