U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433-2846

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

~~**Issue Date: 11 March 2011**~~

Case No.: 2009-SOX-26

In the Matter of

THERON T. MATTHEWS,
Complainant,

v.

AMETEK, INC.,
Respondent.

ORDER OF DIMISSAL

BACKGROUND

This matter involves a complaint brought by Complainant against Respondent under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (the Act)[1] and regulations promulgated pursuant thereto.[2] On 24 Mar 09, Complainant filed his first amended complaint. On 4 May 09, Respondent filed a motion to compel Complainant to respond to 23 interrogatories and 34 requests to produce. Since then, the discovery process in this case has been long and contentious with repeated disagreements over requests to produce and depositions leading to multiple continuances. A large number of various motions to compel and for protective orders have been filed. Teleconferences were held on a number of occasions, including 11 Feb 09, 4 Mar 09, 11 May 09, 22 May 09, 30 Jun 09, 20 Oct 09, 10 Nov 09, 21 Dec 09, 24 Mar 10, 25 May 10, 25 Aug 10, 8 Dec 10, and 5 Jan 11.

By the time of my October 2009 discovery order, I had clearly ruled that Claimant's tax records and information related to his subsequent employment was discoverable and must be produced. During the 10 Nov 09 conference, Complainant's Counsel represented that he had complied with that order.

Following a period during which the parties took depositions, Respondent filed a Motion to Compel on 8 Nov 10, alleging that Complainant refused to identify the name, location, address, position or duties of his new employment or employer and seeking

[1] 18 U.S.C. § 1514A (2011).
[2] 29 C.F.R. Part 1980 (2011).

copies of all documentation, offers, paychecks, written communication, resumes, and applications to/from/concerning/pertaining to the new employment. Respondent also sought to compel production of Complainant's 2009 state and federal tax records. Following a conference call on 8 Dec 10, I granted the motion over Complainant's objection. I did note that Complainant's spouse's information could be redacted, and that Respondent was not to serve any subpoenas on Complainant's current employer without providing Complainant an opportunity to object. After Respondent subsequently requested those subpoenas, Complainant filed no objection on its own motion and even after being contacted by my staff, indicated there was no point in objecting.

Beginning 23 Dec 10, the parties sent another series of motions to the court. Respondent argued that the materials I had ordered Complainant to produce by 17 Dec 10 had not yet been received. In response, Complainant made a motion to quash the issuance of the subpoenas requested by Respondent. I denied Complainant's motion to quash as untimely and without substantive merit. After learning that Respondent had yet to receive 2009 tax records and other pay stubs as required by a previous court order, I ordered Complainant to produce these documents by 19 Jan 11. In that 6 Jan 11 order, I specifically warned the parties that:

> *If for any reason either party believes they can not comply with the deadline for discovery, they must notify me immediately. The parties are cautioned that any party failing to produce documents or otherwise failing to cooperate with the orderly exchange of discovery may face sanctions, up to and including adverse evidentiary inferences and/or the prevention of the offending party from offering any evidence related to that discovery.*

On 21 Jan 11, Respondent filed a notice that Complainant still had not produced the documents. On 24 Jan 11, Respondent sent correspondence stating that Complainant had produced some 2009 tax information but the materials were incomplete, and that Complainant had not produced any information related to his current employment, contrary to the specific previous order. On 31 Jan 11, Complainant responded, stating that Respondent is not entitled to such an "extreme" remedy under the law and arguing that he had complied with the tax information and provided all responsive documents. He stated no W-2 was provided because he was not employed in 2009 and noted Respondent should have known that by way of his deposition testimony. Complainant did not explain or in any way address why he did not either provide the current employment documents or, consistent with the order, immediately notify me that he could not or would not do so. He did state generally that he should not be expected to respond to Respondent's continued "harassing letters" and that an additional conference call was unnecessary.

Nonetheless, the parties initially agreed to a 3 Feb 11 conference call, which Complainant's counsel failed to attend. Repeated attempts that day to reach Complainant's counsel were unsuccessful. Three telephone calls and an email to Complainant were not returned. The following week, my staff's call was answered and a message was left, but the call was not returned that day. On 7 Feb 11, Complainant's Counsel's staff contacted my administrative staff and said that due to a pending storm, Complainant's counsel would not be available for a conference call until the following week.

I issued a show cause order on 15 Feb 11, noting that Respondent still insisted it was not in receipt of all ordered documents and even if Complainant's submission of tax documents was appropriately responsive to my order, I could find nothing in the record to explain or excuse the failure to provide current employment documents. I also noted that Complainant had raised his objections, litigated the issue, and lost. I had ordered production over two months earlier; and Complainant had remained noncompliant. I therefore ordered Complainant to show cause within 10 days why his failure to comply with the discovery order directing him to provide documents relating to his current employment should not result in sanctions to include dismissal of his claim in its entirety.

On 25 Feb 11, Complainant filed a motion to disqualify based on personal bias. He filed no other response to the show cause order. On 3 Mar 11, Respondent filed its opposition to the motion for disqualification and its own motion for dismissal.

MOTION TO DISQUALIFY

The applicable rules of practice provide that

> Whenever any party shall deem the administrative law judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, that party shall file with the administrative law judge a motion to recuse. The motion shall be supported by an affidavit setting forth the alleged grounds for disqualification. The administrative law judge shall rule upon the motion.[3]

The burden is on the party alleging bias by the presiding administrative law judge to support that allegation. Generally, that requires proof of an extra-judicial source of bias and citing unfavorable rulings and possible legal errors is insufficient.[4]

Complainant's motion does not proffer any evidence of, or even allege, any extra-judicial source of bias. Indeed, I have had no relationship, interactions, or contacts with either party or counsel beyond those related to this case and documented in the

[3] 29 C.F.R. § 18.31(b) (2011).

[4] *Powers v. Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union (PACE)*, ARB No. 04-111 (ARB August 31, 2007)(citations omitted).

administrative file. Thus, Complainant's motion for recusal for bias is based solely on his position that the decisions I have made and orders I have issued in the case have been against him, are wrong, and are therefore evidence that I must be biased against him.

If at any point in the case I had developed a personal bias against Complainant, I would have recused myself from the case.[5] I have no interest in the case or either party other than in providing both sides a fair opportunity to develop the record in accordance with the rules of procedure and issuing a decision in accordance with the substantive law.

Complainant's motion is insufficient and is denied.

MOTION TO DISMISS

The applicable rules of procedure provide

> If a party or an officer or agent of a party fails to comply with … an order … for the … the production of documents, … 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…

In order to avoid making the discovery process meaningless, ALJs must have the authority to dismiss complaints, even though that severe remedy should be reserved for only the most extreme cases.[6] The following factors are relevant in determining whether a dismissal of an action is an appropriate sanction: (1) the degree of the actual prejudice to the opposing party; (2) the amount of interference with the judicial process; (3) the willfulness of the noncompliance and culpability of the party; (4) whether the party was warned in advance by the court that a dismissal of the action would be a likely sanction for non-compliance; and (5) the efficacy of imposing lesser sanctions.[7]

This case started over two years ago with a conference call to establish a procedure for clarifying the issues for adjudication, establish discovery and motion timelines, and set a hearing date. Complainant was *pro se* at the time and advised to consider retaining counsel. Within two weeks, Complainant's counsel filed his notice of appearance and a second scheduling call was held.

Since that time, in spite of hours spent in conference calls and dozens of letters, motions, objections, responses, and rulings, I am still unable to say that both sides have had a full and fair opportunity to complete the discovery to which they are entitled under the applicable rules. In that regard, it would be fair to note that Respondent's Counsel appeared to fully exhaust his client's entitlement to affirmative discovery and similarly

[5] 29 C.F.R. § 18.31(a) (2011).
[6] *Matthews v. LaBarge, Inc.*, 2007-SOX-56 (ARB Nov. 26, 2008).
[7] *Conkle v. Potter*, 352 F.3d 313 (10th Cir. 2003).

raise all available protective motions in an attempt to foreclose some of Complainant's discovery requests. In many ways, Respondent may have been more proactive and even aggressive than Complainant in the exercise of its rights to discovery. Indeed, I ruled against Respondent on a number of issues.

However, a fair review of the record would also show that Respondent has been compliant with even adverse orders. Complainant, on the other hand, while not as prolific with the number of motions or extent of discovery sought, has been repeatedly noncompliant, requiring multiple orders, providing late and incomplete responses, and being non-communicative. Complainant's actions have delayed the process, forced Respondent to incur additional and needless litigation costs, and significantly interfered with my ability to resolve the case on the merits in a timely fashion.

I have repeatedly attempted to give the benefit of the doubt to Complainant and assume his delayed and incomplete compliance was a consequence of inability or confusion rather than intent. That assumption was consistent with the very strong preference that cases be adjudicated on the merits of the allegations and the evidence in the record supporting the allegations, rather than technical rules of procedure. However, the most recent failure to comply gives me no reasonable alternative but to conclude Complainant is willfully and intentionally refusing to comply with an order to produce.

Respondent sought documents related to Complainant's current employment. Complainant objected, sought to obtain a protective order, litigated the issue, lost, and was ordered to produce the documents. When he failed to comply with that order, he was ordered to show cause why. He specifically was warned that his failure to show cause could result in a dismissal of his claim. He was given until 25 Feb 11 to respond and according to postal records, received the order on 22 Feb 11. He ignored the show cause order and instead filed on 25 Feb 11 his motion for disqualification.

Given the extensive history of this case and the fact that this is not Complainant's first experience with the discovery process and sanctions for noncompliance, I have no reason to believe that any lesser sanction would significantly increase the probability of ever being able to decide this case on the merits with a fair opportunity for completed discovery in accordance with the rules, or, at the very least, without much more wasted time and expense. Accordingly, the complaint is dismissed.

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PATRICK M. ROSENOW
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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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).