U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 March 2010

CASE NO.: 2009-SOX-00057

In the Matter of:

LESLIE INGRAM MILLER,
Claimant,

v.

STIFEL, NICOLAUS & COMPANY, INC.,
Respondent.

ORDER DENYING RESPONDENT'S MOTION TO PRECLUDE COMPLAINANT FROM FILING IN U.S. DISTRICT COURT; DENYING RESPONDENT'S MOTION TO STAY; DISMISSING THE COMPLAINT; AND CANCELLING HEARING

This cause comes before the Court in the form of "Respondent's Response to Complainant's Notice of Intent to Pursue U.S. District Court Action," ("Motion 1") filed February 22, 2010. On February 1, 2010 Claimant filed a "Notice of Intent to Pursue District Court Action" ("Notice") pursuant to the regulations implementing the Sarbanes-Oxley Act of 2002 ("SOX") found at 29 C.F.R. § 1980 *et seq*. Part 114, "District Court jurisdiction of discrimination complaints," states in relevant part:

> If the Board has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy.

29 C.F.R. § 1980.114(a) (2009). In Motion 1, Respondent argued that Complainant's "request to initiate a lawsuit in United States district court should be denied" because of her failure to timely participate in discovery and engagement of three different attorneys to represent her in the prosecution of her claim. On February 26, 2010 Respondent filed a "Motion to Stay the Summary Decision Deadline and Memorandum in Support," ("Motion 2") further requesting that this Court stay the February 26, 2010 deadline until a ruling on Motion 1 and grant an additional 45 days thereafter to continue taking discovery and file a motion for summary decision.

Findings of Fact and Conclusions of Law

On November 6, 2008 Complainant filed a complaint with the Secretary of Labor alleging that Respondent violated Section 806 of the SOX Act. On June 5, 2009 the Secretary dismissed the complaint, finding that Complainant failed to establish that she had engaged in protected activity. Complainant objected to the Secretary's findings and this case was docketed in the Office of Administrative Law Judges on July 20, 2009. After consultation with the parties, the undersigned set a hearing date of January 12, 2010. On September 4, 2009 Respondent moved for a continuance based on the personal needs of its counsel. Claimant filed its Opposition to Respondent's request for continuance on September 9, 2009. On September 22, 2009 the undersigned granted the request for continuance and rescheduled the hearing for April 27, 2010.

Respondent alleges that between the time that this Court set the second hearing date and the time that Claimant filed her Notice, she changed counsel on three different occasions, most recently in January 2010, after the thirty-day deadline for Complainant to respond to discovery requests served December 1, 2009 had expired. Complainant's most recent change of counsel occurred shortly after her former counsel informed Respondent on January 4, 2010 that they were "having some problems with [their] client" and would be unable to respond to discovery requests in a timely fashion. However, Claimant, through counsel, had served discovery requests of her own on December 31, 2009. To date, Claimant has not responded to Respondent's first set of interrogatories or requests for production. Respondent requests that this Court find that Claimant has acted in bad faith to delay the proceedings and disallow the removal of this proceeding to Federal District court.

The SOX Act provides a right of removal to Federal District court provided that the Complainant has not acted in bad faith to delay the proceedings past the 180-day deadline for a final determination by the Board. *See* 29 C.F.R. § 1980.114(a). Respondent, the party in opposition to removal, has the burden of establishing that Claimant has acted in bad faith. *See Collins v. Beazer Homes, USA, Inc.*, 334 F. Supp. 2d 1365, 1373 (N.D. Ga. 2004) (citing *Murray v. TXU Corp*., 279 F. Supp. 2d 799 (N.D. Tex. 2003) for the proposition that "a plaintiff's ability to file in Federal Court is not premised on a showing of plaintiff's good faith, but is based on a failure to show that the delay was a result of the plaintiff's bad faith."). There is no strong consensus in the case law falling under this SOX provision to establish what Respondent must prove in order to satisfy the "bad faith" requirement for opposition to removal. *See Nixon v.*

Stewart & Stevenson Svcs., Inc., ALJ No. 2005-SOX-1 (Feb. 16, 2005) (acknowledging the dearth of precedent and applying the equitable doctrine of clean hands). Generally, a legal showing of bad faith requires some evidence of scienter or mal intent on the part of the party alleged to have acted wrongfully. *See generally Jean v. Collins*, 221 F. 3d 656, 672-73 (4th Cir. 2000) (interpreting a statutory provision and acknowledging that "bad faith" is a scienter requirement); *Florida Businessmen for Free Enterprise v. City of Hollywood*, 673 F. 2d 1213, 1219 (11th Cir. 1982) (explaining that the statutory standard "reasonably should know" establishes a *scienter* requirement of *bad faith*) (emphasis added).

Here, Respondent has alleged no facts that support a finding of bad faith, but merely alleged the bare existence of bad faith. A mere allegation of bad faith is insufficient to successfully oppose removal under the relevant SOX provision. *See Collins*, 334 F. Supp. 2d at 1374, n.8 (mere suggestion of bad faith absent some greater evidentiary showing is insufficient). Administrative law judges have generally refused to interpret general lack of cooperation as bad faith delay on the part of a SOX complainant. *See, e.g., Stone v. Instrumentation laboratory Co.*, 591 F. 3d 239, 242 n.3 (4th Cir. 2009) (acknowledging that although the claimant agreed to stay discovery pending the ALJ's ruling on a motion for summary decision, bad faith had not been alleged or proven); *Moldauer v. Constellation Brands, Inc.*, ARB No. 09-042, ALJ No. 2008-SOX-73 (ARB Mar. 9, 2009) (no bad faith where pro se claimant failed to respond to an ALJ's order to show cause and later requested a stay of proceedings before filing a notice of intent to remove to Federal District court).

Here, Respondent has alleged that Claimant has failed to cooperate in the discovery process. Respondent has not alleged a nexus between Claimant's lack of cooperation and the delay in the progression of this case to a final determination. Moreover, the one continuance resulting in delay of this case was the result of Respondent's motion and was granted over Claimant's objection. Therefore Respondent has failed to establish "delay due to the bad faith of the Complainant" as required under 29 C.F.R. § 1980.114(a).

ORDER

Accordingly, Respondent's request to retain jurisdiction over this case requested in Motion 1 is **DENIED**. The claim is hereby **DISMISSED** and the hearing scheduled for April 27, 2010, in Minneapolis, Minnesota is hereby **CANCELLED**. Because I no longer have jurisdiction over this case, Motion 2 is deemed moot and accordingly **DENIED**.

IT IS SO ORDERED.

A

ROBERT B. RAE
Administrative Law Judge

Washington, D.C.

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).