U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 April 2011

CASE NO.: 2009-SOX-00019

In the Matter of:

DWIGHT V. NASH,

Complainant,

v.

BEARINGPOINT INC.,

Respondent.

DECISION AND ORDER DISMISSING THE COMPLAINT DUE TO THE BANKRUPTCY OF THE RESPONDENT

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 USC § 1514A ("Sarbanes-Oxley" or "the Act") enacted on July 30, 2002.

Mr. Dwight V. Nash, the Complainant, was an employee of BearingPoint. Inc, the Respondent. BearingPoint terminated Mr. Nash's employment on August 28, 2007. On July 31, 2008, he filed a complaint citing Section 806 of the Act with the Securities and Exchange Commission (SEC). The complaint was referred to the Occupational Safety and Health Administration (OSHA). OSHA dismissed his complaint on December 22, 2008, on the grounds that it had not been timely filed.

On December 31, 2008, the Complainant filed an appeal of the OSHA determination and requested a hearing before an administrative law judge. He contended that he had filed his complaint earlier than the date that OSHA had determined. In his request for hearing he wrote "I would also like to request that the ALJ hold off on reaching a final verdict or judgment in my case; while I seek to refile my claim for whistleblower protection with the SEC for provisions set forth under Sarbanes Oxley Act Section 1107 (Retaliation), and SOX section 802 (misuse of documents)."

BANKRUPTCY OF THE RESPONDENT

On February 18, 2009, while this action was pending, BearingPoint commenced action under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of New York. Under 11 U.S.C. §362(a)(1), the filing of the bankruptcy petition "operates as a stay, applicable to all entities, of the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." After I learned of the bankruptcy filing I issued an order on April 7, 2009 acknowledging the effect of the bankruptcy stay on the proceedings before me.

The Complainant filed a claim with the Bankruptcy Court on April 16, 2009. The basis for that claim was the same violations of Sarbanes-Oxley that he has alleged in this case. On September 17, 2010, the Bankruptcy Court issued an order disallowing the Complainant's claim.

On December 22, 2009, the Bankruptcy Court issued a Confirmation Order confirming the Debtors' Plan submitted to the court by BearingPoint. In Conclusion of Law Number 30 of the order the court stated that "Pursuant to Section 10.4 of the Plan, except as otherwise expressly provided herein or in the Confirmation Order, all Persons or entities who have held, hold or may hold Claims against or Equity Interests in the Debtors are permanently enjoined, from and after the Effective Date, from (a) commencing or continuing in any manner any action or other proceeding of any kind on any such Claim or Equity Interest against any of the Debtors or the Liquidating Trust."

The Bankruptcy Court's Confirmation Order turned the stay provided for in Section 362 of the Bankruptcy Code into a permanent injunction, barring the Department of Labor, or anyone other than the Bankruptcy Court itself, from proceeding on the claim. When the Confirmation Order was issued on December 22, 2009, the Complainant's April 16, 2009 claim was still pending before the Bankruptcy Court. That court dismissed the claim on September 17, 2010. On March 15, 2011, I issued an order to show cause why the claim before the Department of Labor should not be dismissed.

On March 21, 2011, the Complainant responded to my order. In his response he noted that the OSHA denial of his complaint took place on December 22, 2008, and he requested a hearing on December 31, 2008. He argued that because the denial of his claim took place 57 days before the bankruptcy filing "my case (and hearing) technically had nothing to do with their bankruptcy."

It is true that OSHA denied the claim and the Complainant appealed, and that both events happened before the bankruptcy filing. However, the stay under Section 362 expressly applies to a proceeding against the debtor "that ***was*** or could have been commenced before the commencement of the case under this title." [emphasis added] The present complaint was within the scope of the automatic Section 362 stay.

The Complainant submitted an additional response to the show cause order on March 29, 2011. In that submission he noted that on August 30, 2010, he had consulted with an attorney who "confirmed for me that BearingPoint had ended their Bankruptcy proceeding." That advice may be considered correct in the limited sense that the Bankruptcy Court had issued its Confirmation Order, under which the liquidating trust is winding up the affairs of BearingPoint. However, the court

clearly had not ceased supervising the bankruptcy process as of August 30, 2010, as demonstrated by its action in denying the Complainant's claim on September 17, 2010, several weeks after that date.

BearingPoint had not at that time, and has not since, emerged from the bankruptcy process as a going concern capable of being proceeded against in this case. The Confirmation Order, as noted above, has permanently enjoined proceedings of this type.

TIMELINESS OF THE COMPLAINT

The Act provides that an employee protection action "shall be commenced not later than 90 days after the date on which the violation occurs." 18 U.S.C. §1514A(b)(2)(D). The implementing regulations specify that for purposes of the timely filing requirement a violation occurs "when the discriminatory decision has been both made and communicated to the complainant." 29 C.F.R. §1980.103.

The Complainant submitted several documents on the issue of timeliness. In his December 31, 2008 request for a hearing he included a copy of the OSHA determination letter, which states that the Complainant filed a complaint with the SEC on July 31, 2008. On the copy that he provided to this office the Complainant wrote next to this sentence: "Not true. I first filed on December 15, 2007."

On February 23, 2009, before I learned of the bankruptcy filing, I issued an order to show cause why the complaint should not be dismissed on the grounds of untimely filing. The OSHA determination was based on a finding of lack of timely filing and that issue was pending when the bankruptcy stay was imposed. As noted above, the Bankruptcy Court's Confirmation Order compels the dismissal of this claim. However, in order to make as full a record as possible, I will summarize the evidence on the timeliness issue.

The following chronology is taken from documents submitted to me by the Complainant:

8/28/07 Complainant's last work day at BearingPoint.

9/21/07 Timothy J. Bowen, Director of Global Security and Investigations for BearingPoint sends a letter to Complainant referencing a report from Complainant that had been referred to Mr. Bowen for investigation. This letter does not indicate that the Complainant or anyone else has made a report to the federal government.

11/21/07 The Georgia Department of Labor conducts an unemployment compensation hearing in the Complainant's case.

11/23/07 Complainant sends a letter to the General Counsel of BearingPoint with the subject line "Re: Sarbanes Oxley Act Violation." The letter states that in the state unemployment compensation hearing the attorney who represented BearingPoint said that "It did not mean anything if BearingPoint was late paying bills." The

Complainant describes this statement as "a blatant violation of the Sarbanes Oxley Act and a total disregard of the standards set by the SEC."

12/07 approx. The Complainant sends two letters to Katherine Addleman, Director of the Atlanta Regional Office of the SEC. Both of these letters are undated, but both of them refer to events of December 3, 2007 in the past tense. One of those letters says "I would like to ask the SEC to send me information about the Sarbanes Oxley Act protection of 'whistleblowers' and informants under the 'Occupational and Safety Health Administration,' (OSHA), and any potential compensation that may be due to me, as well as the potential re-instatement of my job at BearingPoint."

12/14/07 The Complainant sends a letter to Hon. Johnny Isakson, United States Senator from Georgia. In this letter he requests that Senator Isakson's office assist him in contacting the proper officials at the SEC and OSHA concerning BearingPoint.

12/15/07 The Complainant sends a letter to Hon. Christopher Cox, who was then the Chairman of the SEC, identifying himself as a former employee of BearingPoint, and requesting an investigation by the Commission.

07/08 approx The Complainant sends a letter to Director Addleman. This letter is undated, but mentions a BearingPoint employee whose "last day with BearingPoint is next week, July 31, 2008."

7/31/08 The Complainant sends a letter to Director Addleman, in which he requests that her office "support my receiving 'whistleblower'/ informant benefits set forth under the Federal guidelines of the Occupational Safety [and] Health Administration." He goes on to state that "I believe that I am covered under SOX section 806, 1514A." It was this letter that OSHA found to be the first complaint of Sarbanes-Oxley whistleblower retaliation.

The last day from which the statutory 90 day period could be calculated was the Complainant's last work day, August 28, 2007. The only reports of wrongdoing that the Complainant alleges having made within 90 days of that date are the complaints to BearingPoint employees. His November 23, 2007 letter was addressed to BearingPoint's General Counsel. However, even if this letter had been filed with a federal agency, it would not have constituted a whistleblower complaint. In that letter the Complainant contended that counsel's statements about BearingPoint's bill paying practices violated Sarbanes-Oxley, and expressed concern "as a shareholder and owner of BearingPoint stock options" but did not allege any retaliation against him as an employee.

The first communications with any federal entity for which there is any evidence are the Complainant's two undated letters to Director Addleman. These letters were written no earlier than December 3, 2007, after the 90 day period for filing a complaint had passed.

The Complainant has offered no evidence that he made a complaint, or indeed any communication on this issue, to any federal agency within the statutory time limit. He has not

even claimed to have done so. He made the statement in his appeal of the OSHA determination that he had "first filed on Dec. 15, 2007." This presumably refers to his letter of that date to Chairman Cox and/or his post-December 3, 2007 letters to Director Addleman. The latter, written when the statutory deadline had already passed, asked her for information on how to file a Section 806 complaint. It is therefore clear that when he wrote to Director Addleman he not only had not submitted a Sarbanes-Oxley complaint, but did not believe that he had done so.

Based on the evidence that the Complainant has submitted and statements that he made, it would be necessary to dismiss the complaint for failure to file within the statutory time period even if the Respondent were a going concern against which the complaint could be litigated.

ORDER

The Sarbanes-Oxley whistleblower complaint of **Dwight V. Nash is DISMISSED**.

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KENNETH A. KRANTZ
Administrative Law Judge

KAK/mrc

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).