U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 July 2009

CASE NO.: 2009-SOX-00049

In the Matter of

JOHN A. SMITH,
Complainant,

v.

CHASE INVESTMENT SERVICES CORP.,
Respondent.

ORDER OF SUMMARY DECISION DISMISSING COMPLAINT AND REQUEST FOR HEARING

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 U.S.C. section 1514A ("the Act" or "SOX") enacted on July 30, 2002, and prevailing regulations. Codified at 18 U.S.C. section 1514A et seq., the Act provides the right to bring a "civil action to protect against retaliation in fraud cases" under section 806. Employees who "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 [certain provisions of the Act], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders..." may bring a civil action to protect against retaliation for their actions. 18 U.S.C. section 1514A(a)(1). The Act extends such protection to employees of companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. section 78l)["SEA of 1934"] or that are required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. section 78o(d))". 18 U.S.C. section 1514A(a).

I. PROCEDURAL HISTORY

On May 22, 2009, John A. Smith ("Complainant") filed a complaint with the Department of Labor, Occupational Safety and Health Administration ("OSHA"), alleging that he was terminated from his employment with Chase Investment Services Corp. ("Respondent"). Complainant alleged that his employment was terminated effective September 24, 2009, in retaliation for engaging in protected activity under the Act. Upon investigation of Complainant's allegations, OSHA determined that Complainant's complaint of discrimination was untimely and further determined that Respondent was not a covered entity under the Act. OSHA advised the parties of its conclusions in Findings and Order of the Secretary issued May 26, 2009.

By facsimile dated June 12, 2009, and by regular mail docketed June 15, 2009, the Office of Administrative Law Judges ("OALJ") received Complainant's objection to the Secretary's Findings and request for hearing. The case was assigned to me, and by Order issued June 5, 2009, I directed the parties to show cause whether jurisdiction stood under the Act, considering the late filing of Complainant's case with OSHA, and the statutory provisions regarding coverage under the Act. Complainant filed a response by facsimile on June 12, 2009 and by mail on June 15, 2009. On June 17, 2009, counsel for Respondent entered an appearance and requested an extension to respond to my Order. By Order issued June 24, 2009, I acknowledged the entry of appearance and granted an extension to Respondent. Respondent filed a response to my Order on July 7, 2009.[1]

II. ISSUES

1. Did Complainant timely file his complaint with OSHA?
2. Is Respondent an entity subject to coverage by the Act?
3. Are there a genuine issues of fact that would merit a hearing, or is summary decision appropriate pursuant to 29 C.F.R. §18.41.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary Decision Standard

An administrative law judge ("ALJ") may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. §18.40(d). A "material fact" is one whose existence affects the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A "genuine issue" exists when sufficient evidence demonstrates that a fact finder must resolve the parties' differing versions at trial. Sufficient evidence is any significant probative evidence. Id. at 249 (citing First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-290 (1968). Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Hall v. Newport News Shipbuilding and Dry Dock Co., 24 BRBS 1, 4 (1990). All evidence must be viewed in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., supra. Where a genuine issue of material fact does exist, an evidentiary hearing must be held. 29 C.F.R. §18.41(b).

I find that there exists no genuine issue of material fact regarding the timeliness of Complainant's complaint or Respondent's status as a non-publicly traded subsidiary of a publicly traded parent. Accordingly, summary decision[2] is appropriate in this matter.

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[1] Respondent filed a response by facsimile on July 6, 2009, but that document shall not be deemed the response of the party because the party failed to comply with the Rules of Practice Before OALJ. See, 29 C.F.R. §18.3(f)(2).

[2] Although it is commonplace to issue summary decision in response to motions by the parties, I am authorized to do so upon a showing by the pleadings that there is no genuine material conflict in fact. My Order of June 5, 2009, was, in effect, an invitation to the parties to file such a motion. Respondent evidently did not comprehend the meaning of my Order, and even asked me to affirm OSHA's findings, despite my specific instruction that hearings before OALJ were *de novo*. I specifically advised that "[t]herefore, OSHA's findings are not binding on my decision, and I neither affirm nor dismiss OSHA's determination." See, paragraph 2 of Order issued June 5, 2009.

B. Timeliness of Complainant's Complaint

Complainant filed his complaint with OSHA on May 22, 2009. Complainant was discharged from his employment with Respondent on September 26, 2008. In his pleadings and filings, Complainant has asserted that he was discharged in retaliation for objecting to conduct by his branch manager that Complainant believed to be in violation of federal security laws. Further, Complainant refused to engage in activities directed by his supervisor that he believed to be unlawful.

The Act at 18 U.S.C. § 1514A(b)(2)(D) states:

> **Statute of Limitations.** An action under paragraph (1) [i.e., filing a complaint alleging discrimination] shall be commenced not later than 90 days after the date on which the violation occurs.

The regulations at 29 C.F.R. § 1920.103 states:

> **Filing of discrimination complaint.**
>
> (d) Time for filing. Within 90 days after an alleged violation of the Act occurs (i.e. when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file…a complaint alleging discrimination…

The Department of Labor's commentary on the regulations states:

> [T]he alleged violation is considered to be when the discriminatory decision has been both made and communicated to the complaint. (Citing Delaware State College v. Ricks, 449 U.S. 250, 258 (1980).) In other words, the limitations period [i.e., the 90 days] commences once the employee is aware or reasonably should be aware of the employer's decision. Equal Employment Opportunity Commission v. United Parcel Service, 249 F.3d 557, 561-62 (6th Cir. 2001)…

69 Fed. Reg. No. 163, p. 52106 (August 24, 2004).

The timeliness of the complaint about the alleged retaliatory action is the focus of an inquiry regarding timeliness. Levi v. Anheuser Busch Companies, Inc., ARB Nos. 06-102, 07-020, 08-006, ALJ Nos., 2006-SOX-27 and 108, 2007-SOX-55 (ARB Apr. 30, 2008),

There is no dispute that Complainant was discharged on or about September 26, 2008. Correspondence from an attorney who represented Complainant in other matters, acknowledge that date as the date of termination of Complainant's employment with Respondent. See, letter of January 14, 2009 from attorney Michael Utilla, Esq.; Attachment to Respondent's response filed July 7, 2009. A document on Respondent's letterhead dated September 19, 2008

Regardless, no party is prejudiced and administrative efficiency is served by issuing summary decision in this matter because the record contains no disputed facts on timeliness or coverage.

recommends Complainant's termination. See, "Recommendation for Termination"; Attachment to Respondent's response filed July 7, 2009. A decision by an Administrative Law Judge for the State of New York's Unemployment Insurance Appeal Board (affirmed upon appeal) set the date for Complainant's entitlement of benefits relating to the termination of his employment with Employer even earlier at September 3, 2008. See, Decisions of Appeal Board dated December 15, 2008 and March 31, 2009; Attachment to Respondent's response filed July 7, 2009. None of Complainant's pleadings assert an alternate date for his termination. Accordingly, giving all benefit of the doubt to Complainant, I find that his employment with Respondent terminated on September 26, 2008. Accordingly, his complaint with OSHA was not timely filed.

Despite the untimeliness of his complaint, I find appropriate to examine the record for evidence supporting the tolling of the statute of limitations. Complainant has not specifically cited grounds for tolling, but it is generally accepted that the statutory time period for filing a complaint may be tolled where: (1) a claimant has received inadequate notice; (2) a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted on; (3) the court has led the plaintiff to believe that he had done everything required; (4) affirmative misconduct on the part of a defendant lulled the plaintiff into inaction; (5) a claimant actively has pursued his judicial remedies by filing a defective pleading during the statutory period. *Spearman v. Roadway Express, Inc.*, 92-STA-1 (Sec'y Aug. 5, 1992), citing Baldwin *County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (per curiam); *Irwin v. Veterans Administration*, 498 U.S. 89, 112 L.Ed.2d 435, at 444 and n.3 (1990).

The principle of tolling involving appointment of counsel is not applicable herein. In addition, there is no evidence that any forum led Complainant to believe that he had done everything required to meet standards of timeliness. It is notable that Complainant had sought the advice of an attorney within the statutory period, and did not file a timely complaint under the Act. There is no evidence that Respondent engaged in misconduct that led Complainant into inaction. On the contrary, Complainant pursued unemployment benefits and other remediation actions through counsel, which demonstrates that Complainant was aware of some legal recourse. The record is clear that Complainant had adequate notice of his discharge.

A statute of limitations may be tolled by a demonstration that Complainant had actively pursued his judicial remedies by filing a defective pleading during the statutory period. For equitable tolling to apply, the Complainant must show that he filed the precise statutory claim in issue, a SOX whistleblower claim, but merely did so in the wrong forum. Harvey v. Home Depot U.S.A., Inc., ARB Nos. 04-114 and 115, ALJ Nos. 2004-SOX-20 and 36 (ARB June 2, 2006); Corbett v. Energy East Corp., ARB No. 07-044, ALJ No. 2006-SOX-65 (ARB Dec. 31, 2008). In the instant matter, Complainant appealed the denial of unemployment benefits within the 90 day period allowed for filing a complaint under the Act. However, the decision of the State of New York Administrative Law Judge does not address any contentions regarding alleged whistleblowing activity protected by SOX. See, Decision mailed and filed December 15, 2008, at Attachment to Respondent's response filed July 7, 2009. The decision is confined to discussion regarding whether Complainant engaged in willful misconduct so as to deprive him of unemployment benefits. Accordingly, I find that Complainant's participation in proceedings before the State of New York Unemployment Compensation Board does not constitute grounds for equitable tolling of the time within which he was required to file his SOX complaint.

The record establishes that Complainant, through counsel, specifically referred to Complainant's alleged whistleblowing activities in a letter to two different representatives of Respondent. See, letter dated January 14, 2009 by Attorney Michael Utilla, Esq., at Attachment to Respondent's response filed July 7, 2009. However, that letter is dated beyond the 90 day period following Complainant's discharge from employment, and cannot be considered evidence of tolling of the statute of limitations for filing a complaint of discrimination under the Act.

In his response to my Order, Complainant asserts that he has suffered economic hardship as the result of alleged misconduct by an agent of Respondent. Complainant suggests that the seriousness of the misconduct and the broad impact on his ability to find employment warrant a hearing in his complaint. Regrettably, such assertions do not constitute grounds for the tolling of a statute of limitations. Ubinger v. CAE International, ARB No. 07-083, ALJ No. 2007-SOX-36 (ARB Aug. 27, 2008).

Complainant's complaint with OSHA was filed well past the statutory date provided for filing such complaints. I have found no grounds to toll the statute of limitations. Accordingly, Complainant's complaint must be dismissed.

C. Coverage Under the Act

The Act has been construed to exclude from coverage entities that are not publicly traded companies, but are merely subsidiaries of their publicly traded parents. Rao v. Daimler Chrysler Corp., No. 2:06-CV-13723 (E.D.Mich. May 14, 2007); Klopfenstein v. PCC Flow Technologies Holdings, Inc., ARB No. 04-149, ALJ No. 2004-SOX-11 (ARB May 31, 2006). In Klopfenstein, the Administrative Review Board held that a non-public subsidiary of a publicly held parent company could be subject to the Act's whistleblower provisions if the evidence establishes that the subsidiary acted as an "agent" of its publicly held parent as determined under principles of general common law agency. An employee of a nonpublic subsidiary may be covered under Section 806 of the Act only if it is established that the non-trading subsidiary acts as an agent of its publicly held parent in employment matters. Savastano v. WPP Group, PLC, 2007-SOX-34 (ALJ July 18, 2007).

In the instant case, Complainant has alleged no facts that support a finding that Respondent is other than a non-publicly traded employer. Respondent's submissions in response to my Order of June 5, 2009 assert that Respondent Chase Investment Services Corporation ("CSIS") is not publicly traded. Respondent asserts without contradiction by Complainant that CSIS is a wholly-owned non-publicly traded subsidiary of a publicly traded company, JP Morgan Chase & Co. There is no evidence that Respondent's parent company was involved in the decision to terminate Complainant's employment, or that Respondent acted as its parent's agent with respect to Complainant's employment. I note Complainant's concern that the Act does not apply to Respondent merely because of its organizational status. However, the Act created a cause of action specifically to protect employees of publicly-traded companies, and absent extraordinary circumstances, the whistleblowing protections of the Act are not extended to employees of privately held subsidiaries. Brady v. Calyon Secs. (USA), 406 F. Supp. 2d 307, 318 n.6 (S.D.N.Y. 2005), Slip op. at 7; Bothwell v. American Income Life, 2005-SOX-57 (ALJ Sept. 19, 2005).

Accordingly, I find that Respondent is not an entity that is subject to Section 806 of the Act. Therefore, even if Complainant's complaint to OSHA had been timely filed, the action against Respondent must be dismissed.

ORDER

For the reasons stated herein, Complainant's objection to the Secretary's Findings and request for a hearing are DISMISSED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

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).