U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

RANDALL PITTMAN, **ARB CASE NO. 06-079**

COMPLAINANT, **ALJ CASE NO. 2006-SOX-053**

v. **DATE: May 30, 2008**

DIAGNOSTIC PRODUCTS CORP.,

RESPONDENT.

Appearances:

For the Complainant:
Randall Pittman, *pro se*, Burbank, California

For the Respondent:
Christian J. Rowley, Esq., *Seyfarth Shaw LLP*, San Francisco, California

DECISION AND ORDER OF REMAND

Randall Pittman filed a complaint against his former employer, Diagnostic Products Corporation (DPC), under the whistleblower 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 (West Supp. 2005), and its implementing regulations at 29 C.F.R. Part 1980 (2007). The Department of Labor Occupational Safety and Health Administration (OSHA) dismissed the complaint as untimely. Pittman objected to OSHA's findings and requested review by a Department of Labor Administrative Law Judge (ALJ). Without explanation, the ALJ concluded in a Recommended Decision and Order (R. D. & O.), that no actionable act of retaliation took place within the 90 days required for filing of a complaint under 18 U.S.C.A. § 1514A(b)(2)(D), and so dismissed Pittman's complaint. We remand for specific findings.

BACKGROUND[1]

DPC appears to be a publicly held company subject to SOX. According to Pittman, DPC exclusively did immunodiagnostic testing. Compl. Initial Br. at 2. Pittman began employment with DPC on September 8, 2003, as a Helpdesk Analyst in the Information Technology Department. *Id.* In the fall of 2004, Pittman and DPC began to experience a deteriorating relationship. Pittman filed an Equal Employment Opportunity Commission (EEOC) complaint against DPC for racial discrimination on October 20, 2004. *Id.* at 3-4. DPC suspended Pittman on October 20, 2004, for insubordination and disruptive activity. Upon his return from suspension, DPC issued a notice for continued employment in November of 2004 requiring him to refrain from disruptive and insubordinate behavior. Compl Mot. to Re-Open Rec., Ex. A1, at 1. On January 12, 2005, DPC involuntarily discharged Pittman for failing to return to work after a leave of absence. Jan. 12, 2005 Term. Letter, Resp't. Mot. to Dismiss, Ex. C.

In September of 2005, after his discharge, Pittman sent an e-mail to the Securities and Exchange Commission (SEC). In that e-mail, Pittman alleged that DPC required employees to falsify records. Sept. 7, 2005 E-mail to SEC, Compl. Resp. to Show Cause, Ex. A.

Pittman filed an initial complaint with OSHA on October 4, 2005. *Pittman v. Diagnostic Prods. Corp.*, ALJ No. 2006-SOX-023, slip op. at 1 (ALJ Jan. 25, 2006). In it, he claimed that DPC had retaliated against him in violation of the SOX. However, OSHA dismissed his case on November 3, 2005, because it was not filed within 90 days of his discharge. Pittman initially filed a timely objection to the findings with the Department of Labor's Office of Administrative Law Judges, but later withdrew his request for a hearing stating that he wished to file against individual "agents" of DPC rather than against the corporation itself. Jan. 19, 2006 Req. to Withdraw Compl., Resp't. Mot. to Dismiss, Ex. F, at 1; *Pittman v. Diagnostic Prods. Corp.*, ALJ No. 2006-SOX-023, slip op. at 1 (ALJ Jan. 25, 2006). *But see Saporito v. FedEx Kinko's Office & Print Servs.*, ARB No. 06-043, ALJ No. 2005-CAA-018, slip op. at 4-5 (ARB Mar. 31, 2008) (distinguishing withdrawing complaint from withdrawing objection to OSHA findings under whistleblower statutes); *Sabin v. Yellow Freight Sys., Inc.*, ARB No. 04-032, ALJ No. 2003-STA-005, slip op. at 9 (ARB July 29, 2005). Pittman's first complaint is not before us.

Pittman's second complaint, the one we now consider, was filed with OSHA on December 4, 2005. It complains of SOX-prohibited retaliation by DPC "agents": Michael Ziering (DPC chief executive officer), Ira Ziering (DPC vice president), Sid Aroesty (DPC president), and Christian Rowley (DPC external counsel). When OSHA issued its findings on January 17, 2006, that Pittman's second complaint, too, was untimely, he requested review of his complaint on January 24, 2006. On February 21, 2006, the assigned ALJ issued an order for Pittman to show cause why his complaint should not be dismissed as untimely for being filed more than 90 days after his discharge.

Pittman responded to the show cause order on March 6, 2006. He conceded that a claim of whistleblower retaliation premised on his January 12, 2005 discharge would be untimely,

[1] In reciting the background information, the Board is not making findings of fact but simply reciting information in the record.

since he did not file his complaint until December 4, 2005. Instead, noting that SOX also applies to former employees, he focused on his September 2005 post-discharge e-mail to the SEC, which he characterized as a complaint of DPC's illegal acts and defrauding shareholders. He then listed post-September 2005 alleged retaliatory acts of DPC and its agents that had taken place within the 90-day filing period.

Pittman claimed, for example, that DPC refused to pay him earned wages, sent a memorandum that defamed him to DPC employees, failed to reinstate him and refused to allow him to view his personnel file. Mar. 6, 2006 Compl. Resp. to Show Cause Order at 2-4. Pittman further alleged that both DPC's workers' compensation insurer and its medical provider did not return his calls and thus retaliated against him. *Id.* at 3-4.

The ALJ concluded that these post-discharge actions were not adverse employment actions under the SOX and dismissed Pittman's second complaint as untimely filed. The R. D. & O says:

> Mr. Pittman responded to the show cause order on March 6, 2006. He concedes that a complaint based on the termination of his employment is time-barred, but he alleges that various actions taken by his former employer after he was terminated were "adverse actions," each of which triggers a new limitations period. None of the post-termination acts alleged by Mr. Pittman appear to constitute adverse employment actions within the meaning of the Act. As a result, Mr. Pittman's complaint under the Sarbanes-Oxley Act is time-barred.

R. D. & O. at 1.

The ALJ did not require DPC to respond to the show cause order, but DPC filed a motion to dismiss raising issues other than timeliness. After the ALJ issued his decision on the show cause order, he ruled that the pending motion to dismiss was moot. Mar. 22, 2006 Order Den. Req. for Att'y fees. Pittman appealed the ALJ's R. D. & O. to the Administrative Review Board (ARB or Board).

JURISDICTION AND STANDARD OF REVIEW

The ARB's jurisdiction to review the ALJ's decision is set out in Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), which delegated to the ARB the Secretary's authority to review ALJ decisions issued under the SOX. 18 U.S.C.A. § 1514A. In reviewing the ALJ's conclusions of law the ARB, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006).

DISCUSSION

The SOX protects employees who provide information to a covered employer (publicly traded company) or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (fraud "in connection" with "any security" or the "purchase or sale of any security"), any rule or regulation of the SEC (see, e.g., 17 C.F.R. Part 210 (2007), Form and Content of the Requirements for Financial Statements), or any provision of Federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above publicly traded companies relating to any such alleged violation. 18 U.S.C.A. § 1514A(a).

Complaints filed under the SOX are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2005). 18 U.S.C.A. § 1514A(b)(2)(C). To prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent knew of the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-027, slip op. at 14-16 (ARB Sept. 29, 2006); *Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, 115; ALJ Nos. 2004-SOX-020, 36, slip op. at 9-10 (ARB June 2, 2006); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7-8 (ARB July 29, 2005). *Cf.* 29 C.F.R. §§ 1980.104(b), 1980.109(a). *See* AIR 21, § 42121(a)-(b)(2)(B)(iv). *See also Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004).

If the complainant establishes by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action, then the respondent can still avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Platone*, slip op. at 16; *Harvey*, slip op. at 10; *Getman*, slip op. at 8. *Cf.* § 1980.104(c). *See* 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv). *See also Peck*, slip op. at 10.

The complaint alleging retaliation must be filed within 90 days of the alleged violation; i.e., when the discriminatory act has been both made and communicated to the complainant. 18 U.S.C.A. § 1514A(b)(2)(D) ("An action . . . shall be commenced not later than 90 days after the date on which the violation occurs."); 29 C.F.R. § 1980.103(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, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.").

Before the Board, Pittman generally makes three arguments. First, he argues that he qualifies as a protected employee under 29 C.F.R. § 1980.101, which defines "employee" to mean "an individual presently or *formerly* working for a company or company representative, an

individual applying to work for a company or company representative, or an *individual whose employment could be affected by a company or company representative*." 29 C.F.R. § 1980.101 (emphasis added). Pittman also contends that the ALJ erred in finding that his claimed adverse actions were not actionable. Compl. Pet. for Rev. at 2-9. Thus, he appears to argue that the post-employment retaliation he claims to have suffered between September 2005 and December 2005, when he filed his complaint, would provide him with a cognizable cause of action under the SOX.

Third, Pittman adds a new argument concerning equitable tolling. The ARB has adopted the principle of equitable tolling, so that if a complainant has failed to file a timely complaint with OSHA, but has filed the "precise statutory claim" in the wrong forum during the limitations period, the complaint can be treated as timely filed. *See, e.g. Levi v. Anheuser Busch Co., Inc.*, ARB Nos. 06-102, 07-020, 08-006, ALJ Nos. 2006-SOX-037, 108, 2007-SOX-055, slip op. at 11 (ARB Apr. 30, 2008) (discussing situations in which equitable tolling applies). Without elaboration, Pittman asserts that a discrimination complaint he filed with the EEOC in November 2004, and a wage claim he filed in the California Division of Labor Standards Enforcement (DLSE) in February 2005 satisfy that tolling requirement. Therefore, he maintains, his complaint was not untimely. Compl. Amd. Pet. for Rev. at 2.

On the other hand, without specifically addressing the time period between September 2005 and December 2005, DPC argues that the ALJ was correct to hold that Pittman's allegations were not adverse actions because they were untimely; or if timely, and without addressing the application of SOX to post-employment, did not relate to terms and conditions of his employment because his employment had already ended. Resp't. Br. at 4. Repeating arguments raised in its motion to dismiss, DPC further argues that the ARB could, on de novo legal review, find that Pittman's second claim is precluded due to his initial October 4, 2005 filing with OSHA and OSHA's November 3, 2005 determination that his claims were untimely. Resp't. Br. at 1-3. Notwithstanding SOX statutory language extending potential liability to officers, employees and agents of covered companies, DPC also argues that 18 U.S.C.A. § 1514A does not allow claims against any respondent other than DPC.[2] Resp't. Br. at 3-4.

We find that these submissions of the parties do not meaningfully address the issues on which the appeal before us turns: the extent to which the SOX extends to post-employment adverse actions, and what post-employment adverse actions are cognizable under the statute. That brings us to consideration of the ALJ's conclusory statement that "[n]one of the post-termination acts alleged by Mr. Pittman appear to constitute adverse employment actions within the meaning of the Act." R. D. & O. at 1.

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[2] Despite Pittman's initial desire to file against the agents of the corporation instead of DPC in his second claim, OSHA included DPC as a party in the caption of its findings. The ALJ issued a show cause order listing DPC as a party in the caption. Pittman responded to the show cause order listing DPC as a party in the caption. Moreover, DPC issued a motion to dismiss listing DPC as a party in the caption and signed the motion to dismiss as counsel for the parties. Finally, the ALJ issued its order listing DPC as a party.

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges under 29 C.F.R. Part 18 and the regulations implementing SOX under 29 C.F.R. Part 1980 require an ALJ to issue an opinion with specific findings and the reasons supporting those findings. ALJ Rule of Practice 18.57(b) provides in relevant part:

> Decision of the administrative law judge. . . . The decision of the administrative law judge shall include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record. It shall be supported by reliable and probative evidence. Such decision shall be in accordance with the regulations and rulings of the statute or regulation conferring jurisdiction.

29 C.F.R. § 18.57(b) (2007). Furthermore, the regulations implementing SOX require: "[t]he decision of the administrative law judge will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (b) of this section, as appropriate. . . ." 29 C.F.R. § 1980.109(a).

Unfortunately, the R. D. & O. fails to discuss whether SOX covers retaliatory acts against former employees and whether the specific acts of retaliation Pittman proffered were actionable as a matter of law. In the course of declaring the complaint untimely, the R. D. & O. drew either a factual or legal conclusion that none of Pittman's claims were adverse actions. We express no view on the merits of Pittman's claims, and it may be that the ALJ can issue a revised R. D. & O. on the record before him. However, without an opinion that complies with 29 C.F.R. § 18.57(b) and 29 C.F.R. § 1980.109(a), we are unable to review the decision. We therefore remand for further action consistent with this opinion.[3]

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[3] Pittman requests that the Board re-open the record to add new evidence and to add new respondents. Compl. 2nd Mot. to Re-Open Rec. In view of our disposition of the case, we decline to consider these motions.