U.S. Department of Labor

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

In the Matter of:

BRIAN A. SMALE,

COMPLAINANT,

v.

TORCHMARK CORPORATION,

RESPONDENT.

ARB CASE NO. 09-012

ALJ CASE NO. 2008-SOX-057

DATE: APR 30 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Brian A. Smale, *pro se*, Plano, Texas

For the Respondent:
Michael H. Collins, Esq., Kimberly F. Williams, Esq., *Locke Lord Bissell & Liddell LLP*, Dallas, Texas

ORDER DENYING MOTION TO RESCIND FINAL DECISION

BACKGROUND

On March 18, 2010, the Administrative Review Board received a Motion to Rescind Final Decision and Order Issued November 20, 2009, filed by the Complainant Brian Smale, in this case arising under the whistleblower provisions of the Sarbanes-Oxley Act (SOX).[1] On November 20, 2009, the Board had issued a Final Decision and Order denying Smale's complaint. In support of Smale's motion to rescind the Decision, he avers that he did not receive the Final Decision and Order until February 5, 2010. On the same day that the Board issued its Final Decision and Order, Smale placed in the mail a notice to the Board that he intended to re-file his SOX complaint in district court pursuant to 18 U.S.C.A. § 1514A(b)(1)(B). This provision states that if the Board has not issued a final decision within 180 days of the date on which the complainant filed a SOX

[1] *See* 18 U.S.C.A. § 1514(A) (Thomson/West Supp. 2009).

complaint and there is no showing that the complainant has acted in bad faith to delay the proceedings, the complainant may bring an action at law or equity for de novo review in the appropriate United States district court, which will have jurisdiction over the action without regard to the amount in controversy.[2] The Board received this notification on November 27, 2009, seven days after it issued its Final Decision and Order in this case.

In response to Smale's Motion, the Respondent, Torchmark Corporation, avers that the fact that Smale submitted a notice of intent the same day that the ARB issued its Final Decision and Order is not a valid basis for rescinding its order, especially given that the ARB did not know that Smale had filed his Notice of Intent to File when it issued the decision.[3] In any event, Torchmark argues that the ARB is not divested of jurisdiction to enter a final order simply because a complainant notifies the Board of his intention to file suit in federal court.[4]

Torchmark also notes that the doctrine of res judicata and issues of finality weigh in favor of not rescinding the Decision, and that it should not have to continue to expend the time and money responding to Smale's SOX claim when the ARB has already issued a final decision resolving the complaint.[5]

In response to Smale's contention that he did not receive a copy of the decision when the Board initially issued it, Torchmark argues that this is not a reason to rescind the Final Decision and Order. It points out that Smale's statement that he did not receive the ARB's Order until February 5, 2010, is misleading. Torchmark's attorney sent Smale a copy of the ARB's Order on January 4, 2010, and Smale signed the return receipt, evidencing that he received this correspondence on January 10, 2010.[6] Thus, Torchmark

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2 18 U.S.C.A. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114.

3 Respondent's Response in Opposition to Complainant's Motion to Rescind (Resp. Opp.) at 2.

4 *Id.* In support of this argument Torchmark cites to *Rusick v. Merrill Lynch & Co., Inc.*, ALJ No. 2006-SOX-045 (Mar. 22, 2006). In *Rusick,* after the complainant informed the judge of his intent to file in district court, she issued an Order directing the complainant to serve the OALJ with a copy of the pleadings filed in federal district court, and advising that she would retain jurisdiction until so served. Because the complainant did not serve the OALJ with a copy of federal district court pleadings, she issued an order advising the parties that the OALJ continued to assert jurisdiction over the matter. The respondent moved for dismissal of the complaint and the complainant failed to oppose the respondent's motion; answering instead with a letter reiterating his intention to file in district court. Finding that she retained jurisdiction of the complaint until the complainant filed in district court, the judge granted the respondent's motion and dismissed the complaint.

5 Resp. Opp. at 2-3.

6 *Id.* at 3.

avers that Smale received a copy of the Final Decision and Order a little over one month after if was issued, and he was in no way prejudiced by his failure to initially receive the Order from the ARB.[7]

DISCUSSION

As an initial matter, we acknowledge that the copy of the Final Decision and Order that the Board mailed to Smale was sent to the wrong address.[8] Nevertheless, we agree with Torchmark, that this fact alone is not grounds for the Board to rescind its order, especially given the fact that Smale has demonstrated no prejudice as a result of the Board's mistake.

Smale has failed to establish that the fact that he did not receive a copy of the Final Decision until January 10, 2010, from Torchmark or February 5, 2010, from the Board prejudiced him in any way. Even if he had received the copy of the Final Decision the Board initially sent to him on November 20, 2009 (although at the wrong address), he would not be in any different legal position in relation to his desire to re-file his complaint in federal district court. If in fact he does file in district court, as he indicates he will, then it will be up to the district court to decide whether it can obtain jurisdiction pursuant to 18 U.S.C.A. § 1514A(b)(1)(B) after the Board has issued a final decision for the Department of Labor on Smale's SOX complaint.

On April 12, 2010, the Board received Complainant's Objections to Respondent's Response in Opposition to Complainant's Motion to Rescind. Although the Board's Show Cause Order did not provide for the filing of Complainant's objections, Torchmark has not objected to the filing, and we have considered Smale's arguments in reply to Torchmark's response.

Smale first stated that the Board has not issued a show cause order in response to Smale's Notice of Intent to File Lawsuit in Federal District Court. Smale is correct that the Board routinely files a Show Cause Order in cases in which a complainant informs the Board of his or her intent to file in district court, while the complainant's case is pending before the Board. But in this case, as the Board notified Smale in its February 1, 2010 letter to him, since the Board had issued a Final Decision and Order in the case before we received Smale's notification, "there was no further action necessary or appropriate for the Board to take in [his] case."

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[7] *Id.*

[8] Using the United States Postal Service's Track & Confirm function to track the delivery of certified mail, we have confirmed that the copy of the Final Decision issued by the Board on November 20, 2009, that should have been delivered to Smale was instead delivered to an address in Washington, D.C.

Smale also argues that Torchmark's citation to *Rusick* is inapposite because there the complainant notified the judge of his intent to file in federal district court before the 180-day period had run, while the period in Smale's case had long passed. Smale is correct that the complainant Rusick informed the judge of his intent to file before the 180-day period, but he also informed the judge of his intent to file after the period had expired.[9] As the judge correctly recognized, the determinative fact was not when the complainant gave notice of his intent to re-file (either before or after the 180-day period had run), but whether she retained jurisdiction to decide the case, which she did until such time as the complainant re-filed his complaint in district court.

Finally, Smales cites to an Order Withdrawing Final Judgment and Granting Plaintiff's Motion to Extend Time to Respond To Respond [sic] to Report and Recommendations in *Smale v. United States of America,* 4:06-CV-6 (E.D. Tex. Apr. 10, 2007) as authority for deciding that a failure to receive any court or administrative order can serve as a basis for rescinding the order. However, even if the Board found such an order persuasive, the crucial difference is that in that case, Smale was prejudiced by the court's failure to properly serve him because he lost the opportunity to respond to the court's Report and Recommendations; in this case he has demonstrated no prejudice as a result of his failure to receive the decision until January 10, 2010.

CONCLUSION

Accordingly, because Smale has failed to establish any legal basis requiring the Board to rescind it's order and knowing of no such grounds, we **DENY** Smale's Motion to Rescind Final Decision and Order Issued November 20, 2009.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

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[9] Slip op. at 2, n.3.