

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 August 2005

CASE NO.: 2005-SOX-00027
and
CASE NO.: 2005-SOX-00028

IN THE MATTER OF:

SUSAN E. RYDBERG,
Complainant,

and

CHERYLINN J. REICH
Complainant,

v.

SUPERVALU, INC
Respondent.

**DECISION AND ORDER APPROVING COMPLAINANT'S
VOLUNTARY WITHDRAWAL OF OBJECTION AND HEARING REQUEST**

Background of these two cases

These cases arise under the employee protection (whistleblower) provisions of the Sarbanes-Oxley Act of 2002 (the "Act" or "SOX"), Public Law 107-204, codified at 18 U.S.C. §1514A. The whistleblower provisions appear at Title VIII of the Act, which is designated as the Corporate and Criminal Fraud Accountability Act (CCFAA) of 2002. Any action brought under these statutes is governed by the rules and procedures set forth in 29 C.F.R. Part 1980. On December 21, 2004, the Regional Administrator for the Occupational Safety & Health Administration (OSHA) sent to Complainants' attorney the "Secretary's Findings" concerning the Complainants' administrative complaints under the employee protection provisions of the SOX. The letter informed the Complainants that based on an investigation, the Secretary of Labor, acting through her agent, the Regional Administrator for OSHA, found no reasonable cause to believe that Respondent violated the Complainants' rights under CCFAA. On January 26, 2005, the Complainants filed objections to the Secretary's Findings and Order.

On February 3, 2005, I held a pre-hearing telephone conference to discuss pre-hearing matters and to schedule the hearing. The Complainants, Ms. Susan E. Rydberg and Ms. Cherylinn J. Reich, were present for the call and represented themselves. The Respondent was represented by Ms. Barbara J. D'Aquila and Ms. Kathleen A. Hughes. Although at an earlier stage during the investigation, the Complainants had an attorney represent their interests, both Complainants represent themselves *pro se*. I told them they have the option to hire an attorney at any stage of this case.

Since the evidence and witnesses were expected to be similar for the cases of each Complainant, I discussed the option to join the cases and hold a combined hearing. The parties agreed that the cases be joined for one hearing.

The parties agreed to a discovery, motion practice, and trial schedule. The trial was scheduled to begin October 3, 2005 and continue through October 7, 2005.

On March 4, 2005, the Complainants filed a Motion for Voluntary Dismissal, Without Prejudice. They requested "to voluntarily dismiss this matter, without prejudice, to pursue these claims under state law." They further stated their belief that "the state court is the more appropriate forum to pursue their claims against the Respondent."

On March 24, 2005, the Respondent filed its Motion and Memorandum in Support of Motion for Summary Decision and Dismissal with Prejudice. First, the Respondents contended that both Complainants were untimely in appealing the decision of the OSHA Regional Director to the Office of Administrative Law Judges. Instead of meeting the 30-day time limit to appeal, Ms. Rydberg appealed on day 36 and Ms. Reich filed on day 44. Second, the Sarbanes Oxley Act does not provide a right to a dismissal without prejudice. Third, any appeal "becomes final upon withdrawal by Complainants" and "withdrawing an appeal cannot result in a dismissal without prejudice."

On April 6, 2005, the Complainants submitted a Responsive Motion with supporting affidavits.

On April 12, 2005, Respondent submitted a Reply Memorandum. In that Reply, Respondent's attorneys stated the following:

Since filing its original dismissal motion on March 24, 2005, SUPERVALU has obtained a certified mailing receipt which indicates that Complainants' former counsel, Nichols Kaster & Anderson, received OSHA's December 21, 2004 dismissal on December 27, 2004. Assuming the authenticity of this certified mailing receipt, Ms. Rydberg's appeal filing on January 26, 2005 would be timely. In light of this new evidence, and assuming its authenticity, SUPERVALU does not contest the timeliness of Ms. Rydberg's appeal.

The Respondent continued to challenge Ms. Reich's appeal as being untimely.

On April 28, 2005, the Complainants filed a Reply to Respondent's April 12, 2005 Memorandum.

On July 25, 2005, I held a pre-hearing conference call with the following persons in attendance: Ms. Rydberg and Ms. Reich for the Complainants; Ms. Hughes and Ms. D'Aguila for the Respondent; and my Legal Assistant, Ms. Diane Johnson. Our discussion included the following matters:

1. The parties provided further justification as to why their positions were correct on the issue of whether these cases could be dismissed with or without prejudice.

2. Both Complainants stated they were withdrawing their case in accordance with 29 C.F.R. § 1980.111. They stated they still did not agree with the Secretary's findings, but acknowledged that by withdrawing their case under this section, that they were removing their objections to the Secretary's findings and those findings would then become final.

3. Both Complainants acknowledged that by withdrawing their respective cases, that they would be barred by the statute of limitations from filing another subsequent federal SOX claim regarding their employment with the Respondent since a subsequent claim would be untimely.

4. I told the parties that if I approved a withdrawal without prejudice so the Complainants could take their complaints against Respondent into a state court, that I had no authority over a state court and did not have knowledge of any actions or remedies available to the Complainants in a state court.

5. The Complainants each stated that they still wished to withdraw their cases under 29 C.F.R. § 1980.111.

6. The counsel for the Respondent stated their request to have the Complainants' cases either dismissed with prejudice or dismissed with no language concerning with or without prejudice.

7. I told the parties that I would prepare an order with my reasoning stating that I found the Complainants each had filed timely appeals to the Secretary's findings. Also, I would permit the Complainants to withdraw their claims without prejudice to take any available action in a state court.

8. The counsel for the Respondent stated their objections to those decisions.

**Both Complainants filed timely appeals to the
Chief Administrative Law Judge**

As stated above, the Respondent has withdrawn its position that Ms. Rydberg filed her appeal late. They continue to contest that Ms. Reich's appeal was timely. Based on the following findings of fact, I find that Ms. Reich's appeal was also timely.

After reviewing the submissions by the parties, I find the following as facts.

On December 21, 2004, the Regional Administrator for the Occupational Safety & Health Administration (OSHA) sent to Complainants' attorney, Mr. Adam Gillette, at Nichols Kaster & Anderson, the "Secretary's Findings" concerning the Complainants' administrative complaint under the employee protection provisions of SOX. The letter is titled "RE: Supervalu, Inc./ Rydberg & Reich / . . . Secretary's Findings." The letter informed the Complainants that based on an investigation, the Secretary of Labor, acting through her agent, the Regional Administrator for OSHA, found no reasonable cause to believe that Respondent violated the Complainants' rights under CCFAA. The Regional Administrator stated that the Complainants had "30 days from receipt of these Findings to file objections and request a hearing on the record, or they will become final and not subject to court review."

The above notice was received at Complainants' attorney's office on December 27, 2004. Page four of the notice is date stamped with that receipt date. In addition, the Respondent's counsel has stated, as mentioned above, that a certified mail receipt shows December 27, 2004 was the date of receipt.

On January 26, 2005, Ms. Reich told Ms. Rydberg she was out of town due to a family medical emergency and asked that Ms. Rydberg include Ms. Reich's intent within the appeal letter filed on January 26, 2005. Ms. Reich also informed Ms. Rydberg that it was her intent for Ms. Rydberg to provide notice of her intent to appeal and when she returned to town, she would file her appeal letter dated January 26, 2005.

On January 26, 2005, Ms. Rydberg timely submitted a letter to the Chief Administrative Law Judge, U.S. Department of Labor, stating the Complainants' objections to the Findings and stating that "Complainants respectfully request that a hearing be scheduled to provide an opportunity to present those corrections and omissions of material facts on the record." Ms. Rydberg stated, "In closing, please note that I am representing both Complainants in this appeal and request for hearing." Ms. Rydberg then signed the letter above her typed name and contact information. Below that, she typed "For Cherylinn J. Reich, Complainant (Pro se)." Below that line, she added the contact information for Ms. Reich.

Ms. Reich stated that Ms. Rydberg "did as I requested and not to act as my attorney"

On February 3, 2005, Ms. Reich filed a letter dated January 26, 2005 with the Chief Administrative Law Judge, U.S. Department of Labor, requesting a hearing to present corrections and omissions of material facts on the record. Ms. Reich states under oath that this letter was her second request to appeal the Secretary's findings.

Based on the above-listed facts, I find that Ms. Reich had requested, and given authority for Ms. Rydberg to sign the appeal for her -- which was then timely filed on January 26, 2005. There is no prohibition on having another person sign a legal document "for" another. Frequently, even opposing counsel sign legal documents for the opposing attorney at the request and permission of the other attorney, and such documents are accepted by this court. The Code of Federal Regulations, when discussing "who may file" a SOX or CCFAA case, states at 29 C.F.R. § 1980.103(a), that an employee who believes he or she has discriminated against in violation of the Act "may file, **or have filed by any person on the employee's behalf** [emphasis added], a complaint alleging such discrimination." That same language is used at § 1980.103(d), titled "Time for filing." An employee may file, or have filed by another person on the employee's behalf, a complaint alleging discrimination.

I find that both Complainants met the filing deadline from the Regional Administrator's that the Complainants had "30 days from receipt of these Findings to file objections and request a hearing on the record, or they will become final and not subject to court review."

The second letter -- dated January 26, 2005 and submitted by Ms. Reich on February 3, 2005 -- was not timely. However, the letter filed by Ms. Rydberg, and filed on January 26, 2005, as discussed above, did timely provide notice for Ms. Reich that she was appealing the Secretary's Findings.

Complainants' Request to Voluntarily Withdraw is Granted

As stated above, the Complainants, on March 4, 2005, filed a Motion for Voluntary Dismissal without Prejudice. They further state their reasons to withdraw from federal proceedings and their preference to take their case to state court.

In their motion, the Complainants appeared to make a knowing and voluntary request to dismiss their cases. They did not state within their motion whether they understood that due to the statute of limitations, a voluntary dismissal at this time would bar the Complainants from filing another SOX or CCFAA case related to the claim in this case. However, they clearly stated their intention to not participate further in the rigors of a federal court proceeding.

During the above mentioned July 25, 2005 conference call, the Complainants stated they wished to withdraw their complaints under 29 C.F.R. § 1980.111. Section 1980.111(c) states the following:

At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Board. The judge or the Board, as the case may be, will determine whether the withdrawal will be approved.

The Complainants acknowledged that they understand that by withdrawing their complaints, the Secretary's findings would then be unopposed and become final. They also acknowledged that by withdrawing these complaints, any subsequent federal SOX complaints they might later attempt to file against the Respondent -- related to their employment with the Respondent -- would be barred as untimely.

The Respondent continued its objection to the Complainants' request that the withdrawal or dismissal be without prejudice, pressing their argument that such a dismissal may only be with prejudice.

There is no indication that a settlement is involved in this request for dismissal.

Under the provisions of 29 C.F.R. § 1980.111(c), any party may withdraw its objections to the Secretary's findings at any time prior to the time the findings and order of the administrative law judge become final. The Complainant's Motion for Voluntary Dismissal, Without Prejudice was filed in a timely manner. During the above-mentioned July 25, 2005 conference call, both Complainants stated they wished their withdrawal request to be in accordance with § 1980.111.

Approval of their withdrawal request would terminate all proceedings before the Office of Administrative Law Judges. A withdrawal removes Complainants' objections to the Secretary's Findings and their request for an administrative law judge hearing. The Regional Administrator, Occupational Safety & Health Administration, U.S. Department of Labor previously advised the parties that in the absence of an objection and request for a hearing before an administrative law judge, the Secretary's Findings and preliminary order becomes the Final Order of the Secretary of Labor.

The main issue related to this withdrawal request involves Complainant's request for "without prejudice" language and the Respondent's objection and demand for "with prejudice" language. I find that the Complainants have included this phrase to pursue potential subsequent relief under state law. In that regard, my authority in this case relates solely to the federal whistleblower cause of action under SOX. The Complainants have acknowledged that approval of their request to withdraw their objection to the Secretary's findings will terminate their federal complaints, and the Secretary's findings will then become final.

Concerning the Complainants' stated desire to proceed to a state court, only the appropriate state court has the jurisdiction and knowledge of their court system to determine whether this Order will prejudice the Complainants in any effort to file subsequent state actions against the Respondent. I will therefore not make a ruling that

this decision is “with prejudice” with respect to any potential state court action. Only the state court can determine the impact of this decision granting approval of the withdrawal of this federal SOX claim.

Considering the above factors, I grant the Complainants’ request to withdraw their complaints. The Complainants have been told that the statute of limitations would bar them from filing another SOX or CCFAA case related to the claim in this case. A voluntary withdrawal does not toll a statute of limitations; expiration of the limitations period will bar a complainant from filing another SOX or CCFAA complaint based on the same facts.

Also considering the above factors, since I am granting the Complainants’ request for a voluntary withdrawal, I do not grant Respondent’s Motion and Memorandum in Support of Motion for Summary Decision and Dismissal with Prejudice.

ORDER

Upon consideration of the foregoing,

IT IS HEREBY ORDERED that Ms. SUSAN E. RYDBERG’S and Ms. CHERYLINN J. REICH’S request to withdraw their objection to the December 21, 2004 Secretary’s Findings is hereby approved. The trial scheduled for October 3, 2005, in Minneapolis, Minnesota is hereby cancelled.

A

WILLIAM S. COLWELL
Administrative Law Judge

Washington, D.C.
WSC:dj

NOTICE OF REVIEW:

NOTICE OF APPEAL RIGHTS: To appeal you must file a petition for review (Petition) within ten business days of the date of the administrative law judge's decision with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 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. Your Petition must specifically identify the findings, conclusions or orders you object to. You waive any objections you do not raise specifically.

At the time you file the Petition with the Board you must serve it on all parties, and the Chief Administrative Law Judge; the Assistant Secretary, Occupational Safety and Health Administration; and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If you do not file a timely Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110. Even if you do file a Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days after you file your Petition 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).