

**U.S. Department of Labor**

Office of Administrative Law Judges  
2 Executive Campus, Suite 450  
Cherry Hill, NJ 08002

(856) 486-3800  
(856) 486-3806 (FAX)



**Issue Date: 23 February 2004**

Case No.: 2004-SOX-00016

In the Matter of

**MICHAEL P. FLOOD,**  
Complainant,

v.

**CEDANT CORPORATION,**  
Respondent.

**DECISION & ORDER GRANTING MOTION TO DISMISS**

This case arises out a complaint of discrimination filed pursuant to the employee protection provisions of § 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (the Act), enacted on July 30, 2002. The Act prohibits retaliatory or discriminatory actions by publicly-traded companies against their employees who provide information to their employers, a federal agency, or Congress that alleges violations of 18 U.S.C. §§ 1341, 1343, 1344 or 1348, or any provision of Federal law related to fraud against shareholders. 18 U.S.C. § 1514A(a).

On September 18, 2003, Michael P. Flood (Complainant) filed a complaint before the Occupational Safety and Health Administration of the U.S. Department of Labor (OSHA), alleging that his employer, Cedant Corporation (Respondent), terminated him in violation of the Act. OSHA conducted an investigation into the complaint and issued a finding on November 20, 2003 that the complaint was not timely filed. On December 18, 2003, Complainant filed an appeal of that determination with the Office of Administrative Law Judges. The case was subsequently assigned to the undersigned. Respondent filed the Motion to Dismiss, postmarked on February 10, 2003 and received on February 11, 2003, based on the ground that the complaint was not timely filed. Complainant failed to file a Response to the Motion.

The Act requires that a complaint be filed within ninety (90) days of the alleged retaliation. 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d). The only issue is whether Complainant complied with the ninety day statutory filing period.

On June 12, 2004, Respondent notified Complainant by e-mail that unless he found alternative employment within Respondent's business by June 23, 2004 his

employment would be terminated on June 26, 2004. *See Exh. A to Respondent's Motion to Dismiss*. This notification was also sent to Complainant by overnight delivery service. Complainant in his appeal of OSHA's determination argues that the statute of limitations began to run on June 26, 2003, the date on which his termination became effective. Respondent argues in its Motion to Dismiss that although the date of termination was June 26, 2003, the statute of limitations began to run on June 12, 2003, the date Complainant received and replied to Respondent's e-mail notifying him of his impending termination.

The Act requires filing "within ninety days of the alleged violation of the Act." 29 C.F.R. § 1980.103(d). A complaint is not timely unless filed within the ninety day statutory period. *See Walker v. Aramark Corp.*, 2003-SOX-22 (ALJ Aug. 26, 2003); *see also Moldauer v. Canandaigua Wine Co.*, 2003-SOX-26 (ALJ Nov. 14, 2003). The date of the violation occurs "when the discriminatory decision has been both made and communicated to the complainant." 29 C.F.R. § 1980.103(d). This rule is not altered in situations where the notice of termination indicated that an employee could continue his or her employment if able to secure an alternative position within the company. *Watson v. Eastman Kodak Co.*, 235 F.3d 851 (3d Cir. 2000) ("[T]he mere speculative possibility of continued employment does not alter" the rule that a violation has occurred when the complainant learns of it.) Therefore, assuming that Complainant did not know that he was being terminated until he received the notice, the date of the alleged violation would be June 12, 2003. At latest, Complainant was aware that he was being terminated on June 13, 2003, the date he received the overnight letter.

As discussed earlier, Complainant's written complaint was filed on September 18, 2003. In order to be considered timely, the written complaint must have been filed within ninety day of the alleged action. In this case the alleged action was Complainant's termination. Using June 12, 2003, Complainant filed his claim ninety-six days after he became aware of his termination. The June 13, 2003 date means that his claim was filed ninety-five days after he became aware that he was being terminated. Either way, Complainant did not file his claim within the ninety day time period specified in the Act. Further, no equitable tolling is available to Complainant. In his appeal of OSHA's decision, Complainant indicated that his presence in "Eastern Europe" was "part of the reason the original charge was not submitted earlier." *See Exh. C to Respondent's Motion to Dismiss*. However, there is no indication that Complainant's presence in "eastern Europe" was the result of any action by Respondent. It therefore does not excuse his late filing. As such, the complaint was not timely filed.

**ORDER**

Respondent's Motion to Dismiss is hereby **GRANTED**.

The hearing scheduled for March 8 and 9, 2004 in New York City is **CANCELED**.

**A**

PAUL H. TEITLER

Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE OF APPEAL RIGHTS:** This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on 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. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).