



Issue Date: 24 March 2006

CASE NO.: 2006-SOX-27

In the Matter of

PAMELA STEVENS,
Complainant

v.

INTERPUBLIC GROUP OF COMPANIES
dba NAS RECRUITMENT COMMUNICATIONS,
Respondent

**ORDER DENYING RESPNDENT'S MOTION TO DISMISS AND GRANTING
RESPONDENT'S MOTION IN LIMINE**

The Complainant in the above-captioned matter has filed a complaint against the Respondent under the employee protection or "whistleblower" provision of Section 806 of the Corporate and Criminal Fraud and Accountability Act, Title VII of the Sarbanes-Oxley Act of 2002. 18 U.S.C. § 1514A et seq. ("Sarbanes-Oxley" or "Act"). A hearing will be rescheduled in a forthcoming Order.¹ On March 8, 2006, the Respondent filed a Motion in Limine and a Motion to Dismiss. Complainant submitted her replies to each Motion on March 22, 2006.

I. Motion to Dismiss

The Respondent alleged that the Complainant failed to serve it with a copy of her objections to the findings of the Assistant Secretary of Labor and, consequently, did not properly file her objections. Therefore, Respondent has argued, the findings of the Assistant Secretary should be deemed final and the case should be dismissed.² Complainant responded that she timely filed her objections and served them on the required parties as she understood those parties to be. She further argued that failure to serve all required parties should not bar her from proceeding with her case.

A. FACTUAL BACKGROUND

On April 22, 2005, the Complainant filed her complaint with the Occupational Safety & Health Administration ("OSHA"). After conducting an investigation, OSHA issued its findings in a letter dated October 13, 2005, which concluded that Respondent did not violate Complainant's rights under Sarbanes-Oxley. That letter stated that Complainant had thirty days

¹ The hearing had been scheduled for March 28, 2006 in Chicago, Illinois. In an Order dated March 15, 2006, I granted Complainant's request for an extension of time in the hearing.

² The Respondent has offered three exhibits in support of its Motion, which shall be labeled RX A1-A3, respectively.

from receipt to file objections and request a hearing before an Administrative Law Judge. It further stated that objections must be filed with the Chief Administrative Law Judge, with copies to:

- (1) Respondents;
- (2) Michael Conners, Regional Administrator, OSHA;
- (3) Gary Anderson, Area Director, OSHA; and
- (4) Department of Labor, Associate Solicitor, Division of Fair Labor Standards.
(RX A1).

By letter received by the Office of Administrative Law Judges on November 21, 2005, the Complainant objected to OSHA's findings and requested a hearing. Her letter lists four recipients's addresses: (1) the Chief Administrative Law Judge; (2) Conners; (3) Anderson; and (4) the Associate Solicitor. It does not list the Respondent by name. (RX A2). In deposition, the Complainant testified that she sent the letter to the four people listed, but not the Respondent. (RX A3).

On January 24, 2006, Respondent filed a Motion, *inter alia*, to Receive a Copy of Complainant's Objections and Complaint. I granted that Motion by Order dated January 30, 2006. My administrative staff mailed a copy of Complainant's objections and supporting documents to Respondent's counsel shortly thereafter.

B. LEGAL DISCUSSION

The Regulations implementing Sarbanes-Oxley, 29 C.F.R. § 1980 et seq., describe the duties of a complainant who requests a hearing before an Administrative Law Judge after receiving the Assistant Secretary's findings.³ § 1980.106(a) states, in pertinent part:

Any party who desires review, including judicial review of the findings...must file any objections and/or request for a hearing on the record within 30 days of receipt of the findings...Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If neither party timely files objections, the findings become final and judicial review is no longer available. 29 C.F.R. § 1980.106(b).

By failing to serve the Respondent with a copy of her objections, the Complainant has failed to comply with the requirements of § 1980.106(a). The question, therefore, is whether that failure merits dismissal of the claim. The answer to that question, however, is dependent upon a characterization of the issue. In past decisions, Administrative Law Judges have characterized this issue in three different ways:

³ The Assistant Secretary issues findings after completing an investigation of the complainant's complaint. 29 C.F.R. § 1980.104-05.

- (1) Whether a complainant's failure to serve the Respondent deprives the Court of jurisdiction to hear the claim;
- (2) Whether the requirement to serve the Respondent is subsumed in the act of filing such that a failure to do so equates with failing to timely file;
- (3) Whether the requirement to serve the Respondent is not part of filing such that a failure to do so constitutes a failure in meeting an ancillary procedural requirement.

Although case law addresses each potential characterization, it does not provide which answer definitively controls. A review of case law, however, does provide guidance in how to properly characterize the issue.

1. Service as Jurisdictional

Characterizing the Complainant's obligation to serve the Respondent as an issue of jurisdiction would result in dismissal of this case. Following that reasoning, the Complainant must serve the Respondent to perfect her request for a hearing and this Court cannot hear the case absent such a perfected request.⁴ Characterizing the issue as jurisdictional, however, is inappropriate.

In *Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, ARB No. 04-101, ALJ No. 2004-ERA-9 (ARB Oct. 31, 2005), a case that arose under the Energy Reorganization Act ("ERA"), the Administrative Review Board ("ARB" or "Board") ruled that a complainant's failure to serve the respondent does not deprive the Court of jurisdiction to hear the case. The Board drew a distinction between 29 C.F.R. § 24.4(d)(2), which vests the Court with jurisdiction,⁵ and 29 C.F.R. § 24.4(d)(3), which sets out the requirements for filing and serving the hearing request.⁶ *Shirani* at 6. It further stated that service of process, generally, "is properly regarded as a matter discreet from a court's jurisdiction to adjudicate a controversy." *Id.* (citing *Henderson v. United States*, 517 U.S. 654, 671 (1996)). Therefore, the Board concluded that a complainant's failure to serve the respondent with copies of the hearing request is not an issue of jurisdiction.

⁴ See e.g. *Cruver v. Burns Int'l*, 2001-ERA-31 (ALJ Dec. 5, 2001).

⁵ 29 C.F.R. § 24.4(d)(2) states, in pertinent part:

The OSHA notice of determination shall include or be accompanied by a notice to the complainant and respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination. The complainant or respondent in turn may request a hearing within five business days of the date of the a timely request for a hearing by the other party. If a request for a hearing is timely filed, the notice of determination of the Assistant Secretary shall be inoperative, and shall become operative if the case is later dismissed.

⁶ 29 C.F.R. § 24.4(d)(3) states, in pertinent part:

A request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall be sent by the party requesting a hearing to the complainant or the respondent (employer), as appropriate, on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall also be sent to the Assistant Secretary for Occupational Safety and Health and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

This reasoning is applicable to the Sarbanes-Oxley context. Like the ERA regulations, the Sarbanes-Oxley regulations also contain distinct provisions that vest this Court with jurisdiction and describe the requirements for filing and serving the hearing request. The former appears at 29 C.F.R. § 1980.105(b)-(c), which, in language similar to the ERA's § 24.4(d)(2), states:

The letter accompanying the findings and order will inform the parties of their right to file objections and to request a hearing [with an Administrative Law Judge]...The findings and preliminary order will be effective 30 days after receipt by the named person pursuant to paragraph (b) of this section, unless an objection and a request for a hearing has been filed as provided at § 1980.106.

The latter appears at § 1980.106(a), detailed above, and is also similar to its ERA counterpart at § 24.4(d)(3). Therefore, the Board's holding in *Shirani* provides precedent when the same issue arises under Sarbanes-Oxley. Thus, the Complainant's failure to serve the Respondent with a copy of her objections does not deprive this Court of jurisdiction.

The Board in *Shirani*, however, addressed only the limited question of whether or not this issue is jurisdictional. In answering in the negative, it did not decide whether service is part of filing or an ancillary procedural requirement. Therefore, despite its appellate guidance, *Shirani* does not obviate the need to consider the remaining alternatives.

2. Service as a Non-Jurisdictional Element of Filing

If the Complainant's duty to serve the Respondent is an element of filing, her case may be dismissed for failure to file unless the doctrine of equitable tolling applies.⁷ According to this reasoning, save equitable tolling, the plain meaning of the statute requires that OSHA's findings become final if no objections are timely filed.⁸ One Administrative Law Judge decision endorsed this characterization; another gave it favorable consideration.⁹

⁷ In *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 8, 1999), the Board identified three principal, though not necessarily exclusive, situations where equitable tolling is appropriate:

- (1) When the defendant has actively misled the plaintiff respecting the cause of action;
- (2) When the plaintiff has in some extraordinary way been prevented from asserting his rights; and,
- (3) When the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Gutierrez at 4. It then listed five factors to be weighed in determining whether a party is entitled to equitable tolling:

- (1) Whether the plaintiff lacked actual notice of the filing requirements;
- (2) Whether the plaintiff lacked constructive notice of the requirements;
- (3) Whether the plaintiff diligently pursued his rights;
- (4) Whether the defendant's rights would be prejudiced by the tolling of the limitations period; and,
- (5) The reasonableness of the plaintiff's ignorance of his rights.

Id.

⁸ See *Swint v. Net Jets Aviation, Inc.*, 2003-AIR-26 (ALJ Order July 9, 2003).

⁹ Some Administrative Law Judges have defined the issue in terms of the applicability of equitable tolling. It is noteworthy that, of the three potential characterizations, equitable tolling can only apply if the issue is characterized as part of filing but not jurisdictional. If it is considered jurisdictional, the Court lacks the authority to apply equitable tolling. If the issue is considered a non-filing procedural requirement, equitable tolling would not apply as

In *Lerbs v. Buca di Beppo, Inc.*, 2004-SOX-8 (ALJ Order Dec. 30, 2003), the Administrative Law Judge found a complainant's failure to serve the respondent with objections to be subject to the doctrine of equitable tolling. The Administrative Law Judge accepted, without discussion, that the service requirement was an element of filing. After summarizing the respondent's argument concerning lack of service, he then stated that the issue at hand was the "thirty-day filing provision of this regulation." *Lerbs* at 2 (emphasis added). He then considered whether the filing provision "is a jurisdictional requirement which cannot be modified or a non-jurisdictional procedural limitations period subject to equitable tolling." *Id.* Therefore, in ruling that equitable tolling applies, the Administrative Law Judge characterized the issue as an element of filing, though not jurisdictional; however, he did not do so in consideration of the service requirement as a procedural requirement apart from filing.

In *Richards v. Lexmark International, Inc.*, 2004-SOX-49 (ALJ Order Oct. 1, 2004), the Administrative Law Judge concluded that failure to serve the respondent with the hearing request constituted either a failure to comply with a procedural requirement or a failure to file and thus subject to equitable tolling. *Richards* at 11.¹⁰ She declined, however, to choose between the two because under either option, the basis for adjudication would be whether the respondent incurred prejudice.¹¹ Finding no such prejudice, the Administrative Law Judge ruled that dismissal was inappropriate under either approach. *Id.* at 11-12. Therefore, while stopping short of definitively characterizing the issue, *Richards* provides favorable treatment for characterizing the issue as either an element of filing or as an ancillary procedural requirement.

3. Service as an Ancillary Procedural Requirement

If the Complainant's failure to serve the Respondent is considered an ancillary procedural requirement apart from filing, the case may be dismissed if the Respondent establishes that it incurred prejudice due to the procedural failure.¹² In addition to the favorable consideration in *Richards*, another Administrative Law Judge's decision endorses this approach.

In *Robinson v. Northwest Airlines, Inc.*, 2004-AIR-37 (ALJ Order Oct. 28, 2004), the Administrative Law Judge considered a complainant's failure to serve the respondent with a copy of the hearing request as an issue separate from filing. *Robinson* at 3-4.¹³ In that case, the respondent premised a motion to dismiss on defective service and complainant's failure to timely file a hearing request.¹⁴ The Administrative Law Judge considered these issues separately, thereby characterizing the service issue as a matter separate from filing. *Id.* at 2-4. Moreover, the Administrative Law Judge only considered the service issue in terms of prejudice to the

that doctrine only applies to issues of filing timeliness. Therefore, Administrative Law Judges that characterize the issue as subject to equitable tolling are indeed proceeding under the approach considered in this subsection.

¹⁰ The Administrative Law Judge quickly decided against characterizing this issue as jurisdictional.

¹¹ I note, however, that basing a potential application of equitable tolling solely on the issue of prejudice does not comport with *Gutierrez*.

¹² See *Richards* at 11-12.

¹³ *Robinson* arose in the context of the Aviation and Investment Reform Act for the 21st Century ("AIR 21"). However, because 29 C.F.R. § 1979.106(a), the AIR 21 regulation that describes filing and service requirements, is substantially similar to 29 C.F.R. § 1980.106(a), the case is instructive in deciding the same issue under Sarbanes-Oxley.

¹⁴ The respective arguments arose from separate sets of facts.

respondent, an approach consistent with characterizing it as an ancillary procedural requirement.¹⁵

4. Analysis

Therefore, as is true across much of the landscape of Sarbanes-Oxley, no controlling precedent exists for how to characterize this issue. I find, however, that the issue is properly characterized as an ancillary procedural requirement. The plain meaning of § 1980.106(a) supports such a conclusion. The relevant language of that provision reads:

Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001, *and* copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington DC, 20210. (Emphasis added).

This language, therefore, establishes two distinct requirements: one for the filing objections with the Chief Administrative Law Judge and another for serving copies on other parties. These requirements are separated by the conjunction “and.” Therefore, the former is the filing requirement; the latter is an additional procedural requirement, ancillary, yet separate, from filing.

This reading is not directly inconsistent with any case law. It is consistent with *Richards*, which considers such a reading favorably, and *Robinson*, which applies it. Moreover, it is not wholly inconsistent with *Lerbs*, which did not address the possibility of characterizing service this way. It is also noteworthy that *Lerbs* was decided before *Shirani* was issued and therefore much of its analysis focused on jurisdiction, a viable option at the time. With that option now foreclosed, it is that much more important to consider whether the service issue is separate from filing altogether. In considering that possibility fully, I find that it is.

5. Potential Prejudice to Respondent

Because the issue is one of an ancillary procedural requirement, the case may be dismissed only if the Respondent establishes resulting prejudice that warrants such drastic action. *See Robinson* at 3-4. However, in this case, the Respondent has not asserted any such prejudice. Rather, it has merely alleged that it was inconvenienced by having to take steps to procure a copy of the Complainant’s objections. However, such inconveniences do not amount to prejudice that would merit dismissal of the case.

Moreover, additional facts surrounding this case also counsel against a finding that the Respondent has incurred any prejudice. First, the degree to which Respondent may have been prejudiced by a loss of time to prepare has been obviated by a continuance in the hearing.¹⁶ Second, the degree to which any such loss of time ever prejudiced the Respondent is negligible as, by Order dated March 7, 2006, the Respondent achieved partial summary decision on a

¹⁵ *Accord Jain v. Sacramento Mun. Util Dist.*, 89-ERA-39 (Sec’y Nov. 1991).

¹⁶ Similarly, in *Richards*, the Administrative Law Judge found that a continuance in the hearing eliminated any time-based prejudice the respondent may have incurred due to the complainant’s failure to serve it with a copy of the hearing request. *Richards* at 11-12.

substantive issue in the case. Thus, the Complainant's procedural shortcomings have not prevented the Respondent from effectively pursuing its interests.

Accordingly, because Respondent has not established prejudice due to Complainant's failure to serve it with a copy of her objections, dismissal of the case is inappropriate.

II. Motion in Limine

In her Objections to the Assistant Secretary's findings and in response to Respondent's interrogatories, Complainant asserted that Respondent tampered with her home computer in various ways. In its Motion in Limine, Respondent alleged that Complainant refused to produce documents related to these charges, or the computer itself. Therefore, Respondent, has argued, Complainant should be precluded from further asserting any arguments concerning alleged computer tampering.¹⁷ Complainant's response did not contest the Motion in Limine, stating that she no longer intends to present arguments concerning alleged computer tampering in her case in chief.

Accordingly, Respondent's Motion in Limine is granted. Complainant is therefore precluded from further asserting that Respondent tampered with her home computer.

ORDER

IT IS HEREBY ORDERED THAT Respondent's Motion to Dismiss is DENIED. It is further ORDERED that Respondent's Motion in Limine is GRANTED; therefore, Complainant is hereby PRECLUDED from presenting evidence that Respondent tampered with her home computer.

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RICHARD A. MORGAN
Administrative Law Judge

¹⁷ Respondent has submitted one exhibit in connection with this Motion, which shall be labeled RX B1.