

U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)



Issue Date: 21 March 2006

CASE NO.: 2006-SOX-28

In the Matter of

DEBBIE TOWNSEND,
Complainant

v.

BIG DOG HOLDINGS, INC.,
Respondent

ORDER DENYING COMPLAINANT'S LETTER MOTION FOR RECONSIDERATION

On November 29, 2005, I issued an Order to Show Cause ordering the parties to show why this matter should or should not be dismissed due to Complainant Debbie Townsend's (Complainant's) apparently untimely request for appeal and hearing. The parties were to respond by December 15, 2005.

On December 6, 2004, I issued an Amended Order to Show Cause to clarify the Order of November 29. I ordered both Respondent and Complainant, respectively, to file a memorandum of points and authorities in support of or opposing the dismissal no later than December 15, 2005.

On December 15, 2005, I received Respondent's response requesting that Complainant's appeal be dismissed as untimely. No response was received from Complainant, and I was unable to locate a phone number to call and inquire about whether she intended to respond.

On December 21, 2005, the Office of the Chief Administrative Law Judge ("OALJ") received a handwritten letter dated December 12, 2005 from Complainant explaining that OSHA representatives informed her to direct her correspondence to OALJ. The December 12 letter stated that Complainant was appealing the notice of determination, and apologized for delays explaining that she had "computer problems due to a virus from April of 2005" which had not permitted her to complete requests properly and further explained her need to handwrite her letters.

On January 4, 2004, Complainant had still not responded to the Order to Show Cause of November 29, 2005, as amended on December 6, 2005. I issued an order dismissing a portion of Complainant's case involving alleged retaliation in violation of the SDWA due to the late and improper filing of Complainant's appeal request and SDWA's short filing period limitation of thirty days. However, given SOX's longer filing period limitation of ninety days, and based on Complainant's letter to OSHA dated November 11 challenging the dismissal, I gave

Complainant the benefit of the doubt and permitted the SOX claim to go forward to hearing on equitable grounds. I ordered that the procedural deadlines be amended as follows:

- Deadline to file Motion(s) for Summary Decision: 1/24/06
- Discovery deadline (depositions with production of documents): 2/1/06
- Complainant's Prehearing Statement, exhibit exchange, exhibit list, and witness list filing deadline: 2/1/06
- Respondent's Prehearing Statement, exhibit exchange, exhibit list, and witness list filing deadline: 2/3/06
- Response(s) to motion(s) for summary decision deadline: 2/3/06
- Settlement "talk" deadline: 2/3/06

In the order, I admonished Complainant as follows:

She is "to continue her pursuit of retaining a lawyer to represent her in her SOX claim. In addition, Complainant must comply with all pre-trial orders, applicable regulations, and statutes including, but not limited to, regulations at 29 Code of Federal Regulations §§ 18 *et seq.* **Failure to properly respond to my orders or applicable statutes and/or regulations may result in sanctions including dismissal of the complaint or answer, as applicable.**

2006-SOX-00028 Order of January 4, 2006.

In a letter dated January 4, 2006, Respondent requested a continuance of the trial set for February 9, 2006 because of Respondent's attorney's unavailability and Respondent's intention to file a motion for summary decision.

On January 13, I received Respondent's Motion for Summary Decision.

On January 20, 2006, I issued an order granting Respondent's motion for continuance of the trial from February 9, 2006 to March 15, 2006. I found that good cause existed due to counsel's unavailability and because Respondent's motion for summary decision may resolve all issues in the case, obviating the need for a trial and thereby saving judicial resources. I further ordered that the procedural deadlines set by my January 4, 2006 order remain in effect. The Order concluded as follows:

NOTICE IS HEREBY GIVEN that Complainant's further refusal to prosecute her Sarbanes-Oxley claim by missing filing deadlines or failing to cooperate with Respondent's counsel in good-faith may result in dismissal of her case.

On February 2, 2006, I received Respondent's Prehearing Statement/Trial Brief, exhibit list, and witness list.

On February 6, 2006, I issued Complainant another Order to Show Cause why her case should not be dismissed for lack of prosecution and failure to comply with prior orders and procedural deadlines. I gave Complainant until February 13, 2006 to comply by filing and serving a memorandum of points and authorities, including affidavits and other documentary evidence in support of her position, and gave Respondent until February 17, 2006 to respond.

On February 7, 2006, I received from Respondent a Motion to Dismiss for Complainant's failure to comply with my scheduling order.

On February 14, 2006, I issued and entered the Decision and Order Granting Respondent's Motion for Summary Decision and Dismissing Complaint closing this case and vacating the hearing set for March 15, 2006 in Boise, Idaho.

On March 3, 2006, 17 days after I entered judgment dismissing the complaint herein, the Office of Administrative Law Judges in Washington D.C. received an *ex parte* typewritten letter from Complainant dated February 19, 2006 but postmarked February 28, 2006 requesting reconsideration of my dismissal of her complaint and granting of the summary decision against her. I received the letter request on March 8, 2006 and faxed a copy of it to Respondent's counsel for response by March 14, 2006.

Complainant requests reconsideration on the grounds that: (1) she moved from her address of record on January 24, 2006 and did not receive mail relating to this matter until February 18, 2006; and (2) the prior Orders dated January 4, 2006 and January 20, 2006 setting forth the applicable deadlines did not "properly inform[]" Complainant of her obligations with respect to her opposition to the motion for summary decision or pre-trial pleadings.

As of the date of this Order, Complainant still has not complied with my Orders of November 29, 2005, December 6, 2005, January 4, 2006, January 20, 2006, and February 6, 2006. Nor have I received Complainant's Prehearing Statement or accompanying documents, nor her response to Respondent's Motion for Summary Decision.

On March 13, 2006, Respondent Big Dog Holdings, Inc. ("Respondent") submitted its opposition to Complainant request for reconsideration of the February 14, 2006 summary decision in favor of Respondent. The opposition pleading argues that the reconsideration request should be denied for the following reasons:

1. The Request for Reconsideration ("Request") is dated February 19, 2006, but is post marked 9 days later, or February 28, 2006. The Request was received by the Office of Administrative Law Judges on March Judges on March 3, 2006. Notably, the Request references events on February 21, 2006, 2 days after the date of the Request. Complainant obviously back dated her letter to February 19, 2006 to give the false impression that she has acted promptly in requesting reconsideration. Although the Request claims she moved from her address of record on January 24, 2006, Complainant continues to list this address as her return address on the

Request (2401 South Owyhee, Apartment No. 38, Boise, Idaho 83705). As with her previous submissions, Complainant did not, serve a copy of her Request on Respondent. Complainant failed to submit any sworn declarations or admissible evidence to support her Request, and the obvious discrepancies makes the Request inherently unreliable. Nor has Complainant offered any explanation as to why she would wait until February 18, 2006 to check her mail for documents related to this case. Complainant was well aware that a trial date had been set and that both parties were under strict time deadlines.

2. Complainant also ignores the fact that the January 4, 2006 and January 20, 2006 (Orders clearly and unambiguously warned Complainant that her failure to comply with the stated deadlines were grounds for dismissal of Complainant received both Orders before she purportedly changed residences without notifying either the Office of Administrative Law Judges or Respondent. The January 4, 2006 Order admonished Complainant to retain legal counsel, which she obviously also ignored. Complainant now asserts that she did not understand the "legal terminology", and blames the Judge for not clearly explaining her obligations "in terms I could comprehend". There is nothing unclear or overly technical about the January 4 warning that "[f]ailure to properly respond to my orders or applicable statutes and/or regulations may result in sanctions including dismissal of the complaint or answer, as applicable" or the January 20 warning that "further refusal to prosecute her Sarbanes-Oxley claim by missing filing deadlines or failing to cooperate with Respondent's counsel in good-faith may result in dismissal of her case." Complainant's assertion that she interpreted the Orders to only apply to Respondent's obligations rather than her own is absurd.

3. Complainant similarly fails to recognize that Respondent served its motion for summary decision on January 12, 2006. Under Rule 18.40(a), her opposition to the motion was due January 25, 2006, the day after she purportedly changed residences. Complainant waited more than a month after her opposition was due to request reconsideration.

4. Complainant still has not complied with any of her obligations with Complaint. She has not filed an opposition to the motion for summary decision; and she has not filed her pre-hearing statement, witness and exhibit lists, or trial exhibits. As set forth in the February 14, 2006 Order granting Dog summary decision, Complainant was terminated for performance problems, and she cannot establish a *prima facie* case of retaliation or pretext. Her Request fails to present as [sic] single reason or fact which demonstrates summary decision was not appropriate.

5. Complainant's Request is the latest in a long line of bogus excuses and failures to comply with deadlines. She blamed her subordinates when they lodged complaints with Respondent about her harassment and incompetence; she blamed Respondent for her termination despite giving Complainant numerous warnings and chances to improve her performance; she blamed the DOL investigator when her complaint was

dismissed for lack of merit; and she now blames the Judge for not clearly explaining her filing deadlines. Complainant also failed to file a timely appeal to the dismissal of her complaint. While Complainant was granted relief from her late appeal because she claimed she did not receive actual notice of the dismissal until several weeks after it was mailed, it was Complainant's refusal to accept delivery of the DOL's dismissal letter that delayed her receipt. Enough is enough.

I adopt Respondent's arguments in support of denying Complainant's letter request for reconsideration. In particular, I find Complainant not credible as her back-dating of her letter request to February 19, 2006 when her letter cites events occurring on February 21, 2006 combined with the February 28, 2006 postmark on her request cause me to disbelieve Complainant that reconsideration should be granted for any equitable reasons. Moreover, I find that Complainant's letter request for reconsideration is untimely filed pursuant to Federal Rules of Civil Procedure, Rule 59(e) as it was filed 17 days after I entered judgment on February 14, 2006 dismissing her case. Consequently, I find that the letter request motion for reconsideration shall be denied. In sum, Complainant has not offered any valid reason to reconsider the summary decision in favor of Respondent and the dismissal of her complaint.

IT IS ORDERED that Complainant's letter request for reconsideration of my February 14, 2006 Decision and Order Granting Respondent's Motion for Summary Decision and Dismissing Complainant is **DENIED**.

A

GERALD M. ETCHINGHAM
Administrative Law Judge