



Issue Date: 14 June 2004

Case No.: 2004-SOX-00054

In the Matter of

MARC HALPERN

Complainant

v.

XL CAPITAL, LTD.

Respondent

RECOMMENDED SUPPLEMENTAL DECISION AND ORDER
UPON COMPLAINANT'S REQUEST FOR RECONSIDERATION

The Prior Recommended Decision and Order

On June 7, 2004 I issued a Recommended Decision and Order Dismissing the Complaint (herein, "June 7 D&O") which was filed on April 15, 2004. My determination was that the complaint was untimely because it was filed beyond the 90-day limitations period in the Sarbanes-Oxley Act of 2002 (the "Act") at 18 U.S.C. § 1514A(b)(2)(D) and the applicable regulation at 29 C.F.R. §1980.103. The order also cancelled the hearing scheduled for June 16, 2004.

The core findings in my June 7 D&O are: (1) On September 29, 2003 Respondent suspended Complainant from his job (although it continued to pay him wages) and informed Complainant that he would be terminated. (2) Respondent last paid Complainant wages on January 12, 2004. (3) The running of the statute of limitations is not delayed or tolled if Complainant did not know of Respondent's allegedly unlawful motivation for terminating his employment. (4) The running of the statute of limitations is not delayed or tolled if, as Complainant alleges, he and Respondent were engaged in discussions regarding a severance package or severance pay.

Complainant's Request for Reconsideration

In a letter dated June 7, 2004, denominated "Response to Respondent's Response to Order to Show Cause," Complainant requested "reconsideration."^{*} Complainant's arguments in seven numbered paragraphs are summarized as follows:

* On May 26, 2004 I issued an Order to Show Cause requiring Complainant to show cause why the complaint should not be dismissed as untimely. Complainant filed a response on

1. When Complainant was suspended on September 29, 2003 he had no reason to be aware that his termination from employment was assured because he was informed that there would be an investigation regarding his "input."

2. The violation of the Act occurred on March 24, 2004 when Respondent appealed the Pennsylvania Department of Labor's decision awarding Complainant unemployment compensation.

3. It is premature for the administrative law judge to make a ruling on the question of the timeliness of the complaint.

4. Complainant filed a timely request for hearing after OSHA denied the claim as being untimely.

5. The earliest discriminatory action taken by Respondent against Complainant occurred in 2002 when received a "de minimus" salary increase.

6. The second discriminatory action occurred on January 28, 2004, when additional payroll wage payments adjusted the actual termination date to that date.

7. The complaint, filed on April 15, 2004, was timely because -

- A. Complainant was suspended from work with full pay on September 29, 2003.
- B. The termination date was January 12, 2004, but three additional wage payments were made to Complainant for 85.5 hours or 16 calendar days beyond that date.
- C. Respondent did not offer to pay or pay severance to Complainant.
- D. The wages paid Complainant shifted the effective termination date to January 28, 2004. Any harm to Complainant began on that date because it was the earliest date that the violation of the Act "could have been purported" by Complainant.
- E. The 90-day statute of limitation "closed on April 28, 2004," 13 days after the complaint was filed.

June 2. Respondent also filed a response to that order on June 2. Complainant's June 7 request for reconsideration is a second response to the Order to Show Cause as well as a response to Respondent's arguments.

To date, no response to Complainant's June 7 argument has been received from Respondent.

Discussion

As the complaint was filed on April 15, 2004, it is barred by the 90-day statute of limitations if the allegedly unlawful adverse employment action against Complainant occurred on or before January 15, 2004.

The critical fact on which the June 7 D&O was based is that Complainant advised OSHA that on September 29, 2003 Respondent informed him that his employment was suspended on that date and would be terminated. As set forth in my prior decision, this is confirmed by Complainant's e-mail message dated October 1, 2003 in which he wrote:

I am now on suspension and presumably soon to be terminated, for something related to my work project ... in Mobile, Ala.

(ALJ 1: first attachment; ALJ 5, Exhibit 2, p. 2)

In light of Complainant's statement on October 1, 2003, I reject his argument that on September 29, 2003 he did not know that Respondent planned to terminate his employment. As pointed out in my prior determination, the 90-day statute of limitations starts running at the time the alleged violation of the Act occurs, and that is "when the discriminatory decision has been both made and communicated to the complainant." (June 7 D&O at 3, quoting the Department of Labor's discussion of § 1908.103)

In the prior determination I also rejected Complainant's contentions that the statute of limitations does not begin to run until the employee is aware of the unlawful motivation for the employer's adverse action against the employee and that it does not run when there is a possibility that termination could be avoided, referring to English v. Whitfield, 858 F.2d 957 (4th Cir. 1988) and Delaware State College v. Ricks, 449 U.S. 250 (1980).

Ricks directly answers Complainant's current arguments that Employer's decision to terminate him was made after September 29, 2003 because Employer's "investigation" was pending and Employer continued to pay him wages for over three months. The Supreme Court in Ricks held that where a decision to terminate an employee is communicated to the individual the pendency of the employer's internal grievance procedure does not mean (1) that the termination decision was not final or (2) that the statute of limitations is tolled. Ricks, 449 U.S. at 260-61. Ricks also noted that the Supreme Court had previously held that

the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods. Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976).

449 U.S. at 261.

Finally, Complainant does not disagree with the finding in the prior determination that as of January 12, 2004 he was fully aware of Respondent's termination of his employment. Thus, even if Respondent continued to pay Complainant wages until January 28, 2004, as Complainant

contends, under Ricks and English the statute of limitations began to run on January 12, 2004, at the latest. In that scenario, the 90 days for filing a complaint expired on April 12, 2004, three days prior to the date on which the complaint was filed.

I have reconsidered the June 7, 2004 D&O and find that its determination that the April 15, 2004 complaint under the Act is barred by the statute of limitations in 18 U.S.C. § 1514A(b)(2)(D) is correct.

ORDER

The Recommended Decision and Order Dismissing the Complaint issued on June 7, 2004 is reaffirmed. Accordingly, the complaint herein is dismissed.

A

Robert D. Kaplan
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"), U.S. 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 in 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).