

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 October 2012

Case No.: **2012-ACA-00002**

In the Matter of:

RORY BLAKE,

Complainant,

v.

MAST DRUG COMPANY, INC.,

Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This proceeding arises under Section 15558 of the Affordable Care Act, P.L. 111-148 (March 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152 (March 30, 2010) (hereinafter “the Act”). Section 15558 of the Act provides protection for covered employees who report any violation of the Act or who object to or refuse to participate in an action reasonably believed to be a violation of the Act or other law. Section 3310 of the Act prohibits the wasteful distribution of outpatient prescription drugs to long-term care facilities under Medicare prescription drug plans by prescription drug plan (“PDP”) sponsors. This prohibition on excessive prescription drug distribution applies to Medicare plan years beginning on or after January 1, 2012. *Id.* at § 3310(b).

PROCEDURAL HISTORY

On November 5, 2011, Rory Blake (hereinafter “Complainant”) filed a complaint with the Occupational Safety & Health Administration (“OSHA”) alleging that he was fired in retaliation for reporting a violation of Section 3310 of the Act to his employer, Mast Drug Company, Inc. (hereinafter “Respondent”). On July 11, 2012, the Secretary of OSHA issued a decision dismissing Complainant’s complaint after determining that the Complainant essentially alleged an act of Medicare fraud, rather than a violation of Section 3310, thus rendering the Act inapplicable to the complaint. Complainant timely appealed by filing a written objection on August 9, 2012.

ISSUE

Whether Respondent's alleged excessive supply of prescription drugs to Recovery Innovations constitutes wasteful distribution of outpatient prescription drugs to long-term care facilities such that Section 3310 would apply.

FACTS

Complainant alleges in his letters dated November 5, 2011 and August 9, 2012 that Respondent entered into a contract with Recovery Innovations, a short-term patient intake facility, whereby Respondent would deliver certain prescription medication in 30 dose packaging, regardless of the quantity needed by each patient. Medicare and other prescription drug plans would pay for the 30 dose supply of each of the prescriptions. Complainant states that Recovery Innovations would then return any unused medication to Respondent, whose employees would then misappropriate the medication, presumably for resale, without refunding the cost of the returned medications. Complainant voiced his concern to Respondent that the arrangement with Recovery Innovations was illegal and was terminated shortly thereafter.

Respondent argues in its letter dated August 6, 2012, that its pharmacy distributed only the amount of prescription medication prescribed by physicians and may only fill a prescription in the exact specification of the prescribing physician.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Under the Rules for Practice and Procedure for Administrative Hearings, any party may "move with or without supporting affidavits for a summary decision on all or any part of the proceeding." 29 C.F.R. § 18.40(a). A party opposing the motion may not rest on the mere allegations or denials of the motion but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c); Peppers v. Coats, 887 F.2d 1493, 1498 (11th Cir. 1989) (stating that when "a nonmoving party's response to the summary judgment motion consists of nothing more than mere conclusory allegations then the court must enter in the moving party's favor.") The court must view the facts, and all reasonable inferences drawn from those facts, in the light most favor to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). Summary decision is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317 (1986). While the court will not weigh the evidence, a mere scintilla of evidence will not suffice to defeat the motion. Johnson v. Fleet Fin., Inc., 4 F.3d 946, 949 (11th Cir. 1993).

ANALYSIS

Although Complainant alleges that Respondent overfilled prescriptions and then misappropriated any returned medications, such misconduct would not fall under Section 3310 of the Act. Section 3310 governs the actions of PDP sponsors, entities offering a prescription drug plan cooperating with Medicare. 42 C.F.R. 423.401. Because Respondent is merely a

pharmacy, rather than a PDP, it is not governed by Section 3310 of the Act. Further, Section 3310(b) of the Act clearly states that the provision prohibiting wasteful dispensing of prescription drugs applies only to plan years beginning on or after January 1, 2012. Here, the events Complainant describes took place prior to this date, with the Complainant's termination occurring on June 2, 2011. Because the alleged violation occurred prior to the effective date of Section 3310, the events complained of cannot be considered a violation of this section. Given that Complainant has failed to properly allege a violation of any provision of the Act, the protections of Section 15558 are unavailable to him.

CONCLUSION

Based on the foregoing, and having given Complainant the benefit of all reasonable doubt with respect to the evidence on which he relies, I find that the Affordable Care Act complaint filed by Complainant fails to present any genuine issue as to any material fact regarding a violation of the Act.

Accordingly, the complaint is dismissed as a matter of law.

ORDER

It is hereby **ORDERED** that the complaint filed by Rory Blake be **DISMISSED**.

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/jrs
Newport News, Virginia

NOTICE: Review of this Decision and Order is by the Administrative Review Board pursuant to ¶ 5.c.(48) of Secretary's Order 01-2010, Delegation of Authority and Responsibility to the Administrative Review Board, 75 Fed. Reg. 3924 (Jan. 25, 2010) (effective Jan. 15, 2010). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under Section 1558 of the Affordable Care Act of 2010, codified at section 18C of the Fair Labor Standards Act, 29 U.S.C. 218C. Accordingly, this Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.