

**U.S. Department of Labor**

Office of Administrative Law Judges  
36 E. 7th St., Suite 2525  
Cincinnati, Ohio 45202

(513) 684-3252  
(513) 684-6108 (FAX)



**Issue Date: 15 July 2010**

Case No.: 2009-RIS-58

In the Matter of:

U.S. DEPARTMENT OF LABOR,  
EMPLOYEE BENEFITS SECURITY ADMINISTRATION,

Complainant,

v.

PLAN ADMINISTRATOR, KAY TOLEDO TAG INC.  
401(k) RETIREMENT SAVINGS PLAN,

Respondent.

**ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT**

This matter arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001, *et seq.*, and the implementing regulations published at 29 C.F.R. Parts 2560 and 2570. ERISA is a remedial statute designed to protect the integrity of employee benefit plans maintained by employers. To that end, the Act contains extensive reporting and disclosure requirements, and provides civil penalties for failure to comply. The Secretary of Labor has set forth procedures, at 29 C.F.R. § 2560.502c-2, governing the assessment of civil penalties under Section 502(c)(2) of the Act.

On February 9, 2009, Complainant, U.S. Department of Labor Employee Benefits Security Administration ("EBSA"), assessed a \$2,500 penalty against Respondent Kay Toledo Tag, Inc., as plan administrator for Kay Toledo Tag Inc. 401(k) Retirement Savings Plan ("Kay Toledo") for failure to timely comply with ERISA's reporting requirements. Kay Toledo thereafter filed an appeal with the Office of Administrative Law Judges. The matter was assigned to the undersigned administrative law judge, and a hearing was scheduled for July 14, 2010, in Toledo, Ohio.

On June 16, 2010, EBSA filed a Motion for Summary Judgment, with a Statement of Undisputed Facts, a Memorandum in Support of Summary Judgment, and 13 supporting exhibits. EBSA argues that the \$2,500 penalty is reasonable and appropriate under the circumstances of this case. Kay Toledo filed no response to the motion. By Order, issued June 19, 2010, the hearing in this matter was cancelled, pending a decision on EBSA's Motion for Summary Judgment.

### **Summary Judgment Standard**

Pursuant to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, "an administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d); *see also* 29 C.F.R. § 18.41, Fed. R. Civ. P. 56(c).

The party moving for summary judgment has the burden of establishing the absence of evidence to support the non-moving party's case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The non-moving party must go beyond the pleadings and come forth with specific facts to show the existence of an issue of fact that could affect the outcome of the litigation. *Id.* If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," there is no genuine issue of material fact, and the movant is entitled to summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

### **Findings of Fact**

As no opposition was received from Kay Toledo, the following findings were made from EBSA's Statement of Undisputed Facts, as corroborated by the exhibits submitted with its motion.

Kay Toledo Tag Inc. is the plan administrator of Kay Toledo Tag Inc. 401(k) Retirement Savings Plan, number 001. (EBSA Motion, Ex. 1). Plan 001 had 177 participants as of the beginning of the 2006 plan year and its funding arrangement and benefit arrangement were a trust. (EBSA Motion, Ex. 1 at 2).

Under ERISA, Kay Toledo was required to file an annual report using Form 5500, Annual Return/Report of Employee Benefit Plan, with a report from an Independent Qualified Public Accountant ("IQPA"), by July 31, 2007; with a valid extension application, the report was due by October 15, 2007. On October 24, 2007, Kay Toledo

completed a 2006 Form 5500 report for Plan 001. (EBSA Motion, Ex. 1). The filing, however, did not include a satisfactory IQPA report.

On January 4, 2008, and February 27, 2008, EBSA issued two letters to Kay Toledo, requesting that it provide clarification and documentation regarding the tardiness of the annual report, and that it cure the deficient IQPA report. (EBSA Motion, Ex. 2-3). Kay Toledo was required to respond within 30 days, but did not provide a response to either letter. *Id.*

EBSA then issued a Notice of Rejection to Kay Toledo on or about July 30, 2008, reiterating the request for the 2006 IQPA report and providing the company an additional 45 days to comply without incurring a penalty. (EBSA Motion, Ex. 4).

Kay Toledo responded to the Notice on September 15, 2008, and submitted an IQPA Report for the 2006 plan year. (EBSA Motion, Ex. 5). Kay Toledo did not file an amended 2006 Form 5500, and the accountant's opinion in the IQPA report contained disclaimers as to the scope of the opinion. *Id.* On October 24, 2008, OCA Analyst Brian Mica reviewed the September audit and found it unsatisfactory. (EBSA Motion, Ex. 6). The September audit was referred to the Division of Accounting Services for review, and on November 7, 2008, the audit was deemed unsatisfactory for purposes of reporting and disclosure compliance. (EBSA Motion, Ex. 7).

On November 24, 2008, EBSA issued a Notice of Intent to Assess a Penalty, again requesting submission of the 2006 IQPA report for Plan 001, and proposing a \$50,000 penalty against Kay Toledo for its failure to file an acceptable 2006 IQPA report. (EBSA Motion, Ex. 8). The Notice of Intent advised Kay Toledo that it had 35 days within which to submit a statement of reasonable cause, setting forth, in writing, reasons for the failure to file the 2006 IQPA report or why the penalty should not be assessed. (EBSA Motion, Ex. 8). Additionally, the Notice of Intent set forth, in detail, the noted deficiencies of the accountant's opinion, submitted in response to the Notice of Rejection. *Id.*

Kay Toledo responded by letter dated December 22, 2008. (EBSA Motion, Ex. 9). The letter stated as follows:

Kay Toledo Tag Inc. is aware of the issues and demands required by the Department of Labor. We are diligently working with our accountants office, Royal Barber, to clear up this matter. Royal Baber's office was closed from December 22, 2008, [through] January 5, [2009]. This matter will take precedence upon their return.

*Id.* On December 29, 2008, Kay Toledo submitted a revised IQPA report, which was found acceptable. (EBSA Motion, Ex. 10). Kay Toledo later filed an amended annual report for 2006, which EBSA found satisfactory on January 30, 2009. (EBSA Motion, Ex. 10-12).

The Reasonable Cause Committee reviewed Kay Toledo's Reasonable Cause Statement and recommended that since the plan administrator was responsive to the Notice of Rejection and the plan has been brought into reporting compliance, Kay Toledo should be assessed an abated penalty of \$2,500. (EBSA Motion, Ex. 11).

On February 9, 2009, EBSA issued a Notice of Determination on Statement of Reasonable Cause to Kay Toledo, assessing an abated \$2,500 penalty. (EBSA Motion, Ex. 11, 12). EBSA found Kay Toledo's statement of reasonable cause insufficient, and assessed a penalty based on its failure to file an acceptable amended 2006 annual report, with the required IQPA report, in response to the Notice of Rejection. *Id.*

### **Conclusions of Law**

Under ERISA, a plan with more than 100 participants, which holds assets in trust, is required to have an annual audit performed on the plan, and to file an IQPA report with the plan's annual report. 29 C.F.R. § 2520.104-20(b). The legislative and statutory provisions of ERISA make clear the central importance of the plan audit and IQPA report in the Act's monitoring and enforcement scheme; accordingly, failure to file an acceptable IQPA report is a material reporting failure under ERISA § 103.

To ensure compliance, Congress established a maximum fine of \$1,100 per day for reporting failures. 29 U.S.C. § 1132(c)(2); Debt Collection Improvement Act of 1996, § 31001(s). The Secretary of Labor promulgated regulations at 29 C.F.R. § 2560.502c-2, setting forth administrative procedures governing the assessment of these civil penalties. The regulations implement lower penalty rates, providing that a plan administrator may be charged \$150 per day for a missing or deficient accountant's report, to a maximum of \$50,000.

EBSA contends that it followed the procedures set forth in the implementing regulations, and that the ultimate abated penalty of \$2,500 is well within the limits set by Congress and the Secretary of Labor. (EBSA Memorandum at 8-9). EBSA further argues that the \$2,500 penalty was appropriate given Kay Toledo's "numerous opportunities to cure the IQPA deficiency before a penalty was assessed." (EBSA Memorandum at 10). EBSA contends that it observed its own procedures, providing notices and opportunities to cure any defects without incurring a penalty. *Id.* EBSA also afforded Kay Toledo the opportunity to provide a statement of reasonable cause

why satisfactory filings were not submitted. (EBSA Memorandum at 3-4, 11-13; EBSA Motion, Ex. 8). Kay Toledo's response did not provide an explanation for the deficient filings, but stated that Kay Toledo and its accountants were working diligently "to clear up this matter." (EBSA Motion, Ex. 9).

Acknowledging that Kay Toledo eventually submitted an acceptable annual report and IQPA report, EBSA argues that no reasonable cause was shown for the failure to file an acceptable report within the time provided. (EBSA Memorandum at 11). Accordingly, it requests that the penalty of \$2,500 be upheld. *Id.* at 15.

Kay Toledo filed no response to EBSA's motion for summary judgment. In its initial filings with the Office of Administrative Law Judges, however, Kay Toledo argued that its original IQPA report complied with the regulations, and that it acted with diligence and good faith in responding to EBSA's communications. (Answer of Respondent Kay Toledo Tag Inc., filed March 17, 2009). Therefore, Kay Toledo requested that the penalty be reduced. *Id.*

Unless EBSA has acted in an arbitrary, capricious, or unreasonable manner, an administrative law judge generally will not disturb a penalty for failure to file an IQPA report in a timely manner. *See Dep't of Labor, PWBA v. Sociedad Para Asistencia Legal Money Purchase Plan*, 1994-RIS-62, at 3 (ALJ Mar. 29, 1995); *Dep't of Labor, EBSA v. New Design Construction Co., Inc.*, 2007-RIS-9, at 6 (ALJ May 4, 2007); 5 U.S.C. § 706(2).

Kay Toledo failed to file a timely, complete IQPA report. EBSA sent two 30-day letters requesting clarification, to which Kay Toledo filed no response. After receiving a Notice of Rejection, Kay Toledo submitted an amended report, which was again found unsatisfactory. Finally, an acceptable report was filed after the plan administrator received the Notice of Intent to Assess a Penalty. Although Kay Toledo argued in its pleadings that its original IQPA report was in compliance with the regulations, it provided no evidence to raise a genuine issue of fact as to the appropriateness of EBSA's penalty assessment.

The undisputed facts indicate that EBSA followed the procedures governing the assessment of civil penalties. EBSA gave repeated notice and opportunities to cure the defects in the annual report and IQPA report. Further, EBSA acknowledged that Kay Toledo eventually came into compliance, by reducing the fine from \$50,000 to \$2,500. I find no basis to conclude that the penalty was arbitrary, capricious or an abuse of discretion. Therefore,

## ORDER

**IT IS HEREBY ORDERED** that:

1. EBSA's Motion for Summary Judgment is **GRANTED**;
2. Respondent, Kay Toledo Tag, Inc. as plan administrator of the Kay Toledo Tag Inc. 401(k) Retirement Savings Plan, shall pay to the U.S. Department of Labor a civil penalty in the amount of \$2,500 within 45 days of the date of this Order;
3. Any portion of this penalty that is not paid by that date shall be subject to such penalties and interest as ERISA and its implementing regulations have provided.

**A**

LARRY S. MERCK

Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** Pursuant to 29 C.F.R. § 2570.69, a notice of appeal must be filed with the Secretary of Labor within 20 days of the date of issuance of this Decision and Order or this decision will become the final agency action within the meaning of 5 U.S.C. § 704. A notice of appeal should be filed with:

Director of the Office of Policy and Research  
Employee Benefits Security Administration  
200 Constitution Ave, NW, Ste N-5718  
Washington, DC 20210

*See Secretary's Order 6-2009, 74 Fed. Reg. 21524-01, 2009 WL 1227622 (signed Apr. 30, 2009) (delegation of review authority to the Assistant Secretary for Employee Benefits Security). A notice of appeal must state, with specificity, the issue or issues on which the party is seeking review. The notice of appeal must be served on all parties of record.*