



Issue Date: 08 February 2012

Case No. 2010-RIS-00072

In the Matter of:

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

Complainant,

v.

**PLAN ADMINISTRATOR
CONTRACTOR AND EMPLOYEES 401(K) PLAN
FRONTIER CONTRACTING INC. (EBSA CASE NO. 09-0463D),**

Respondent.

ORDER GRANTING EBSA'S MOTION FOR SUMMARY JUDGMENT

This matter arises under § 502(c)(2), 29 U.S.C. § 1132(c)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended (29 U.S.C. Sec. 1001, 1021, 1023, 1024, 1132(c)(2) and 1135), and the implementing regulations at 29 C.F.R. Sec. 2520.104-44, 2560.502c-2, and 2570.60 - 2570.71.

In 2010, counsel for the Employee Benefits Security Administration ("EBSA" or "Complainant") filed a complaint alleging that Frontier Contracting, Inc. ("Respondent") failed to meet various ERISA reporting and disclosure requirements. Respondent is the plan administrator of the Contractors and Employees 401(k) Profit Sharing Plan ("Plan"). EX 1. On May 19, 2011, counsel for EBSA submitted a Motion for Summary Judgment along with Exhibits ("EX") 1-19, a Statement of Undisputed Facts, Complainant's Memorandum in Support of Summary Judgment, and Complainant's Pre-trial statement. EBSA requested that the undersigned 1) uphold the \$50,000 penalty assessed against the plan administrator for failure to file an acceptable, amended 2006 annual return with the required annual audit report, and 2) order Respondent to file a compliant 2006 annual report within 45 days of the order.

Frontier Contracting alleges that it filed its amended 2006 return with the required audit on or about June 2, 2011. On August 9, 2011, EBSA reviewed and accepted the amended 2006 filing. On July 27, 2011, the undersigned issued an "Order to Show Cause Why EBSA's Motion for Summary Judgment Should Not be Granted." Frontier Contracting filed a Response to the order on August 8, 2011, asserting that it did its best to meet the requirements given that the 2006 Plan Year was the first time it had to meet them. It also allegedly had a large turnover of

employees at that time. On October 24, 2011, EBSA filed a letter indicating that it is not opposed to permitting Respondent to try to negotiate a settlement of the matter. EBSA asked the undersigned to hold the summary judgment motion in abeyance for a period of 60 days, in order to permit Respondent to comply with the terms and conditions for settling this matter. According to EBSA, as of January 10, 2012, Respondent did not comply with certain conditions necessary for resolution of this litigation. EBSA now requests the undersigned to issue an order affirming the penalty assessment as set forth in the Notice of Determination on Statement of Reasonable Cause. *See* EX 16.

Summary Judgment Standard

The court should grant the motion for summary disposition when the record (i.e., pleadings, affidavits and declarations offered with the motion and evidence developed in discovery) demonstrate that there are no genuine issues of material fact, and that the moving party is entitled to disposition as a matter of law.” 29 C.F.R. § 18.40(d), 18.41(a); Fed. R. Civ. P. 56 (c). In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). However, a court should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000). The party who brings the motion for summary decision bears the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. A genuine issue of material fact exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *Anderson*, 477 U.S. at 242. However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. *Id.* at 249.

Findings of Law

Under ERISA, the plan administrator of an employee benefit plan is required to file an annual report with the federal government within 210 days after the end of the plan year. *See* ERISA §104, 29 U.S.C. §1024. As of 2006 plan year, the Plan had 155 participants and held assets in trust. EX 1 at 2. Under ERISA, a plan with more than 100 participants that holds assets in trust is also required to have an annual audit performed on the plan and to attach the report of an independent qualified accountant (“IQPA”) to the plan’s annual report. 29 C.F.R. § 2520.104-20(b). On October 10, 2007, Respondent filed its 2006 Form 5500 (Annual Return/Report of Employee Benefit Plan) without the requisite IQPA report. EX 1. On November 29, 2007, EBSA issued its first thirty-day clarification letter to Respondent requesting that Respondent provide the required IQPA report and correct misinformation provided on its original Form 5500. EX 2. Purportedly, Respondent was not aware that it had to submit an audit along with its Form 5500 filing until it received the initial notification from EBSA dated November 29, 2007 at which time it hired Pisenti & Brinker LLP to complete the task. *See* EX 14. Respondent’s collaboration with Pisenti & Brinker LLP did not materialize in a 2006 audit report, and in 2009 Respondent hired a new accounting firm, G&J Seiberlich & Co. LLP, to finalize the review. *See* EX 5, EX 11, EX 14. EBSA has issued Notices of Rejection (“NOR”), dated December 16, 2008, February 6, 2009, and April 24, 2009. EX 7-9. The NORs outlined the deficiencies and requested the missing

2006 IQPA report. The NORs also advised Respondent that it had 45 days to comply before incurring a penalty. On July 27, 2009 and December 28, 2009, EBSA issued a Notice of Intent to Assess a Penalty (“NOI”) for failure to file an amended 2006 report with the required audit. EX 12-13. Around January 28, 2010, Respondent signed and submitted a response to the NOI. EX 14. The Reasonable Cause Committee reviewed Respondent’s reply and recommended assessment of a \$50,000 penalty. EX 15. On March 15, 2010, EBSA issued a Notice of Determination on Statement of Reasonable Cause (“NOD”) rejecting Respondent’s reasons for failure to file a 2006 audit report with the 2006 annual report and assessing a \$50,000 penalty against Respondent. EX 16.

According to the EBSA the compliant 2006 return should have been filed on or before July 31, 2007. EBSA argues that filing a compliant 2006 return five years after the deadline does not demonstrate a willingness to comply. It also points out that Respondent is a repeat non-filer. The “burden of accurate and complete reporting and disclosure is on ERISA plan administrators and fiduciaries, who must meet the requirements of the statute and regulations thereunder.” *U.S. Dep’t. of Labor (PWBA) v. Spalding and Evenflo Co.*, 1992-RIS-19 (Nov. 18, 1994). Respondent must prove to the satisfaction of the ALJ that it demonstrated good faith and diligence in coming into compliance with ERISA’s audit requirements.” *See U.S. Dep’t. of Labor (PWBA) v. Compgraphix, Inc.*, 1999-RIS-53 (ALJ, Oct. 14, 1999) (upholding a penalty assessment of \$50,000 against Respondent for failure to include the report of an independent qualified public accountant (IQPA) as required by ERISA at 29 U.S.C. § 1023(a)(3)(A)); *see also U.S. Dep’t. of Labor (EBSA) v. Tile Finishers Local 88 NY, BAC Savings Plan*, 2208-RIS-20 (ALJ, June 3, 2008) (EBSA’s assessment of \$5,000.00 was proper on grounds that IQPA report was filed 530 days after the initial due date and EBSA demonstrated “scrupulous compliance with the regulatory requirements for imposition of a penalty”); *U.S. Dep’t. of Labor (EBSA) v. Product Mgt., Inc.*, 2007-RIS-113 (ALJ, Feb. 23, 2009) (\$50,000 penalty for failure to file IQPA report affirmed where plan administrator received multiple notices about requirements for IQPA, but failed to comply).

A penalty assessed by the EBSA will generally not be disallowed by a judge unless the judge finds that EBSA “has acted in an arbitrary, capricious, or unreasonable manner.” *Compgraphix*, 1999 RIS 53. Respondent presented no argument that the Secretary has failed to follow the procedures outline in 29 C.F.R. §2560.502c-2. The undersigned finds that EBSA has observed the procedures set forth in the regulation, and Respondent has been afforded all the procedural opportunities available under the statute and the regulations to cure the filing deficiencies without incurring a penalty. The reasons proffered by Respondent are insufficient to excuse non-compliance. As EBSA points out, Respondent failed to demonstrate a nexus between its corporate restructuring and its failure to timely file the required 2006 audit. As a fiduciary to the Plan, Respondent knew or should have known that it needs to retain and segregate all pertinent documents and financial statements in order to complete the audits. Accordingly, EBSA’s motion for summary judgment is granted.

ORDER

IT IS HEREBY ORDERED that Respondent, Frontier Contracting, Inc., pay to the United States Department of Labor a civil penalty in the total amount of \$50,000 within thirty (30) days from the date of service of this Decision and Order for its violations of ERISA, as set forth hereinabove.

IT IS SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: 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.