



Issue Date: 20 April 2005

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In the Matter of

PAUL A. DICKENS
Complainant

Case No. 2005 SOX 00045

v.
AIREM CAPITAL GROUP
Respondent
.....

ORDER DISMISSING

This case arises under the whistleblower provisions of Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A (Sarbanes-Oxley), enacted on July 30, 2002. The Act prohibits any company that provides accounting services to companies with a class of securities registered under §12 of the Security Exchange Act of 1934, or that is required to file reports under §15(d) of that Act, from discharging, harassing, or in any other manner discriminating against an employee who provided to the employer or federal government information relating to alleged violations of, *inter alia*, any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of federal law relating to fraud against shareholders. Paul Dickens, an accountant and former employee of Airem Capital Group, filed a complaint with OSHA on July 21, 2003, alleging that he was the target of retaliation and discriminatory personnel action when he was fired for engaging in activities protected by the Act.

OSHA's Findings

On March 3, 2005, OSHA issued its determination. With respect to most of Complainant's protected activities, OSHA ruled in Complainant's favor. It determined, however, that following a reorganization which eliminated Complainant's position, he was offered a promotion with a pay increase and increased responsibilities, and Complainant voluntarily declined the offer. Respondent deemed the refusal a resignation, but it asked Complainant to remain on board until July 1, 2003, to aid in the transition of work assignments. OSHA

ruled that the decision to decline the promotion did not amount to a constructive discharge.

Thereafter, Respondent met with Complainant and other released employees about the terms of a severance package. During the meeting, Respondent asked Complainant to sign an affidavit that he was not aware of any improprieties or wrongdoing by Respondent, and believing the affidavit would be false if he signed it, Complainant declined. OSHA noted further, however, that during the meeting, Complainant was “extremely critical” of Respondent’s Chief Accounting Officer, Susan Johnson, and exhibited a “hostile demeanor” causing her to fire him immediately, thus terminating him before July 1, 2003, as earlier agreed.

Based upon its inquiry, OSHA concluded that Complainant was terminated early due to his hostile demeanor, not because he refused to sign the affidavit. OSHA was persuaded that Complainant’s refusal to execute the affidavit was not the reason he was fired, noting that another employee who also refused to sign the affidavit was not dismissed. OSHA further concluded that the loss of negotiated severance was not a violation of SOX because it was not a guaranteed benefit of Complainant’s employment. Finally, OSHA found no evidence of harassment and, therefore, it dismissed the complaint.

OSHA’s Notice

In its letter advising the parties of its determination, OSHA wrote:

Respondent and Complainant have 30 days from receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become the (sic) final and not subject to court review.

OSHA then advised the parties where their objections, if any, must be filed, and it continued:

In addition, please be advised that the U.S. Department of Labor does not represent any party in the hearing; rather each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence de novo

for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony presented by the parties....

Complainant's March 30, 2005, Letter

Contingency I.

Following receipt of OSHA's decision, Complainant, *pro se*, timely filed a letter dated March 30, 2005. In it, he states that he read OSHA's determination and that: "Overall I am very pleased with their findings. Obviously I would have been more pleased had I won the case. But based on these findings, I am very relieved to know that the Investigators were able to see through the deception and deceit." Significantly, for purposes of the matter now before me, Complainant went on to explain the purpose of his March 30, 2005, letter. He writes:

At this point, I am willing to accept the Secretary's findings as they are, however, if Airem [Respondent] files for an appeal and objects to the findings, then I would like this letter to serve as my official notice to appeal and to state my objections and interjections below. Or if you read my objections and believe that the Solicitor made the wrong decision, I will accept an appeal at your discretion. An appeal would be extremely expensive for both sides and I don't want to waste anyone's time or money. (bold and underscoring emphasis in original).

Now, the time for requesting judicial review of OSHA's determination under 29 C.F.R. § 1980.105 has expired, and Respondent Airem has neither objected to OSHA's determination nor requested a hearing. Complainant made it abundantly clear that he too is "willing to accept the Secretary's findings," under these circumstances, and only in the event that Airem appealed would his March 30 letter serve as official notice of his appeal. Since Airem did not object to OSHA's ruling, Complainant's first contingency has not been satisfied.

Contingency 2.

Although Complainant indicated that, in the absence of a request for review and objections by the Employer, he accepted OSHA's findings, his March 30 letter contained another contingency in the event Airem did not appeal. Complainant advised that he would "accept an appeal" as a matter of "discretion" if, upon reading the objections he submitted in anticipation of a possible appeal by the Employer, it is believed "that the Solicitor made the wrong decision." This contingency, too, is not satisfied. Under the applicable regulations, judges do not grant or deny hearings as a matter of discretion or prerogative.

I am mindful that Complainant, as a *pro se* litigant, must not be held to the same standards for pleading as a party represented by legal counsel. Vogt v. Atlas Tours, Ltd., 94-STA-1 (Sec'y Apr. 19, 1994); Flor v. United States Department of Energy, 93- TSC-1 (Sec'y Dec. 9, 1994); Dale v. Step 1 Stairworks, Inc., 02-STA-30 (ARB, March 31, 2005). In Dale, the Board observed that filings and representations by *pro se* litigants must be liberally construed. *See, e.g., Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52 (ARB Feb. 29, 2000), slip op. at 10 n.5 ("*[p]*ro se complainants are by nature inexpert in legal matters, and we construe their complaints liberally and not over technically"); Saporito v. Florida Power & Light Co., 94-ERA-35, slip op. at 7 (ARB July 19, 1996) (a *pro se* complainant is entitled to a certain degree of adjudicative latitude). *Cf. Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (papers submitted by *pro se* litigants must be construed liberally in deference to their lack of training in the law). In reviewing Complainant's March 30 letter, I have carefully applied the Board's guidance.

Discussion

I.

Complainant's letter is articulate, thoughtful, and demonstrates clearly that he understood full well his right to invoke the hearing process whether or not Respondent objected to OSHA's findings. He decided, and so stated, that he would accept OSHA's findings "as they are" if Airem did not seek review, and he understood the consequences of his decision. He knew the outcome before OSHA was not in his favor, and noted that: "Obviously I would have been more pleased had I won the case." Moreover, OSHA advised him that its decision was final if neither party requested a hearing. Complainant, nevertheless, emphasized in bold, underscored print that he was "**willing to accept the Secretary's findings as they are**" if Airem did not appeal. (emphasis in original).

Complainant further considered his position if Respondent did seek a hearing. He advised that, in the event Airem filed objections, he wanted his letter to serve as his “official notice of appeal and to state my objections and interjections below.” Thus, the first sentence below Complainant’s signature, written again in bold print for emphasis before the first numbered objection states: **“The following is offered to state my reasons for an appeal, only if necessary, and to object and interject the following items:....”** (emphasis in original).

Considering Complainant’s *pro se* status, I believe it is, nevertheless, clear that Complainant understood he was not initiating a request for hearing. He was reserving the right to respond or cross appeal, if Airem moved forward with the review process. Construed as liberally as the precedents require, I conclude that Complainant acting, *pro se*, carefully and clearly articulated his intentions. He understood the consequences of his decision, and he elected not to initiate the hearing process.

II.

Complainant’s March 30 letter contains a second contingency. As noted above, he submitted a lengthy recitation of objections which he presented as his basis for review in the event Respondent filed for review, but he indicated that he would “accept an appeal” if a review of those objections led to a belief that the “Solicitor made the wrong decision.”

Here again, construing Complainant’s letter as liberally as the guiding authorities dictate, I conclude that, like the contingency which carefully avoided a specific request for review unless Airem requested review, Complainant carefully avoided language that would indicate that he was taking the initiative to seek a *de novo* hearing. As noted above, Complainant objected and interjected reasons for an appeal “only if necessary.” He stated that he would “accept” an appeal “if” his objections were read and if they fostered a belief that “the Solicitor made the wrong decision,” and if an appeal were offered as a matter of discretion.

As I previously mentioned, access to the hearing process is not granted as a matter of discretion by a judge; it is asserted as a matter of right by a party. *See*, 29 C.F.R. § 1980.105. In this instance, the Employer accepted OSHA’s findings and Complainant expressly stated that, under such circumstances, he also accepted them. As such, no sound basis exists for an exercise of discretion which would

involve reviewing and pontificating upon the correctness of OSHA's findings or conclusions.

OSHA specifically advised the parties in its March 3, 2005, determination that in the event a hearing is requested, an adversarial proceeding ensues in which the parties are allowed an opportunity to present their evidence *de novo* for the record, and a decision is rendered "based on the evidence, arguments, and testimony presented by the parties...." OSHA's advice to the parties accurately describes the review process, 29 C.F.R. 1980.107(a)-(d), and in adversarial proceedings, the Board has cautioned judges not to develop arguments on behalf of *pro se* litigants or prejudice the issues. Hasan v. Sargent and Lundy, ARB No. 01-001, ALJ No. 00-ERA-7, slip op. at 4 n.4 (ARB Apr. 30, 2001). See Saporito, slip op. at 6-7. In Griffith, *supra*, it cited the following language from the court's decision in Dozier v. Ford Motor Co., 702 F.2d 1189, 1194 (D.C. Cir. 1983):

At least where a litigant is seeking a monetary award, we do not believe *pro se* status necessarily justifies special consideration While such a *pro se* litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forgo expert assistance.

Considering the nature of the proceedings, and with due regard for Complainant's *pro se* status, I must observe that an adjudicative communication of a belief at this stage of a proceeding that the OSHA did or did not err is unwarranted and necessarily must rest upon non-evidentiary information. It would indeed require a determination, at least preliminarily, that prejudices the ultimate issue the review process is designed to address. Thus, the Board has observed that although the ALJ has some duty to assist *pro se* litigants, he also has a duty of impartiality. Explaining the balance it seeks, the Board observed in Dale, *supra*, that an ALJ satisfies his duty to assist the *pro se* litigant while remaining impartial when he advises an unrepresented party about essential elements of its case.

Yet, there remains a crucial distinction between a judge advising a party about an element of his or her case and actually taking action, such as convening the hearing process as a matter of discretion on behalf of a party following a pre-hearing assessment of that party's comments. The regulations do not contemplate discretionary review, and a judge could not properly initiate the hearing process on his own motion even if he were inclined to do so. At this stage, it is essentially

irrelevant whether I believe OSHA got it right or wrong. Both parties had a right to invoke the hearing process. Neither needed permission to safeguard their rights, and I believe it would be prejudicial to predicate the initiation of the hearing process on a judge's belief that OSHA's determination is or is not error free.

For all of the foregoing reasons, I conclude that, although Complainant is acting *pro se*, he understood that he was entitled to invoke the hearing process simply by requesting it, but he elected not to proceed. Thus, I have carefully reviewed Complainant's letter in the light of Floyd v. Arizona Public Service Co., 90-ERA-23 (ALJ Mar. 19, 1990) and Spearman v. Roadway Express, Inc., 92-STA-1 (Sec'y Aug. 5, 1992). In Floyd, it was held that a telegram simply stating that a complainant: "hereby appeals the decision of the US Department of Labor, Wage and Hour [Division]" was sufficient under the circumstances of the case. In Spearman, a complainant sent a letter to OALJ requesting an extension in order to retain counsel and to prepare and file his objections to the preliminary findings of the Assistant Secretary. The Secretary found that complainant's request for hearing was implicit in the statement that he required additional time in which to prepare and file objections,¹ and construed the first extension request to be a timely objection to the Assistant Secretary's investigation findings. Yet, the circumstances here are readily distinguishable from both Spearman and Floyd. In contrast with Mr. Dickens' communication, neither Spearman nor Floyd included affirmative representations that the complainant accepted OSHA's findings, and neither Spearman nor Floyd included carefully worded, nuanced contingencies prerequisite to initiating the hearing process.

In this instance, Complainant understood that no further proceedings would ensue if someone else did not invoke the hearing process. With an appreciation of the consequences as imparted to him by OSHA, Complainant decided that, although he could have a hearing simply by requesting it, he would not be the one who would initiate it. Consistent with the Board's recent decision in Hasan v. Southern Company, Inc., 03-ERA-32, (ARB, March 29, 2005), concerning advice conveyed to a *pro se* complainant which he elects not to follow, OSHA here advised Mr. Dickens' how to proceed and the consequences of not proceeding. He was adequately informed but his letter was neither an express nor implied request to commence the hearing processes available under 29 C.F.R. §1980.105-106.

¹ In Spearman, it was also reasoned that OALJ apparently understood the letter as a request to invoke the hearing process because the case was docketed and assigned to an ALJ for hearing. It is respectfully submitted, however, that every piece of correspondence sent to OALJ involving every matter pending before it is logged in by a docket clerk and eventually assigned to an ALJ for appropriate action. The docketing process and mere assignment of a matter does not, itself, and never has, signaled any OALJ "understanding" about the content or significance of the communication.

Neither contingency Complainant imposed has arisen, and the time for requesting a hearing has expired. Accordingly, further proceedings before the Office of Administrative Law Judges are unwarranted. OSHA's decision is final. Therefore:

ORDER

IT IS ORDERED that proceedings before the Office of Administrative Law Judges be, and hereby are, dismissed.

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Stuart A. Levin
Administrative Law Judge