



Issue Date: 04 January 2007

CASE NO.: 2006-SOX-00065

In the Matter of

MARK CORBETT,
Complainant,

v.

ENERGY EAST CORPORATION; et al.,
Respondents.

ORDER DENYING RECONSIDERATION AND REQUEST FOR HEARING

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A et seq. (“SOX” or “the Act”) enacted on July 30, 2002. The Sarbanes-Oxley Act provides the right to bring a “civil action to protect against retaliation in fraud cases” under section 806 to employees who “provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employer reasonably believes constitutes a violation of [certain provisions of SOX], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders...” 18 U.S.C. §1514A(a)(1). The Act extends such protection to employees of companies “with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §781)[“SEA of 1934”] or that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §780(d)).” 18 U.S.C. §1514A(a).

I. PROCEDURAL HISTORY

By letter filed July 13, 2005 with the Department of Labor, Occupational Safety and Health Administration (“OSHA”), Mark Corbett (“Complainant”) filed a charge of retaliation against his employer, Energy East Corporation and its subsidiaries, Rochester Gas and Electric and New York State Electric and Gas (collectively referred to hereinafter as “Respondents”) under the Whistleblower provisions of the Sarbanes Oxley Act (“SOX”).¹ Complainant alleged that he was discharged from employment with the Respondents in reprisal for raising protected complaints on March 3, 2005.

¹ Denoted as “Complaint at -.”

On May 11, 2006, Respondents moved for Summary Decision pursuant to 29 C.F.R. §18.40(d). Shortly thereafter, the parties requested the assignment of a settlement judge to assist them in resolving their dispute. By Order issued September 20, 2006, Settlement Judge Michael P. Lesniak advised that the parties were unable to resolve their differences, and the case was reassigned to me. In correspondence filed September 26, 2006, Respondents asked that their motion for summary decision be addressed.

By Order issued October 5, 2006, I denied Respondents' Motion for Summary Decision on the merits. However, I directed the parties to show cause why the complaint should not be dismissed as untimely filed pursuant to the ninety (90) day statute of limitations period set forth at 18 U.S.C. §1514A(b)(2)(D). On October 18, 2006, Respondents filed a response² to my Order. Complainant filed his response³ on October 19, 2006.

By Order issued November 3, 2006 ("Order"), I dismissed Complainant's complaint as untimely. On November 8, 2006, Complainant filed a Motion for Reconsideration and Request for Hearing⁴ asserting that genuine issues of material fact exist related to the timeliness of the complaint. On November 9, 2006, Respondents filed their opposition.⁵ Complainant filed a reply⁶ to Respondents' opposition on November 14, 2006. Before I could rule on the motion for reconsideration, Complainant on November 30, 2006 filed supplemental evidence in support of his motion. On December 15, 2006, Respondent filed its reply in opposition to Complainant's supplemental motion.

II. ISSUES

1. Has Complainant established circumstances warranting reconsideration of my original Order?
2. Has Complainant established circumstances warranting a hearing on the issue of timeliness?

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Applicable Standard of Review

The U.S. Department of Labor ("DOL") has adopted principles that federal courts employ in deciding requests for reconsideration. See 29 C.F.R. §18.1(a); Getman v. Southwest Securities, Inc., ARB No. 04-00059, ALJ No. 2003-SOX-00008 (ARB March 7, 2006). Accordingly, an Administrative Law Judge ("ALJ") may reconsider her decision under limited circumstances, which include:

- (i) there are material differences in fact or law from that presented to the ALJ of which the moving party could not have known through reasonable diligence;

² Denoted as "RB at -."

³ Denoted as "CB at -."

⁴ Denoted as "Motion 1 at -."

⁵ Denoted as "Opposition at -."

⁶ Denoted as "Motion 2 at -."

- (ii) there are new material facts that occurred after the ALJ's decision;
- (iii) there is a change in the law after the ALJ's decision; and
- (iv) there was a failure to consider material facts presented to the ALJ before her decision.

See Getman, *infra*.

B. Discussion

In support of his motion, Complainant asserts that I failed to consider material facts that were presented prior to my decision. Motion 2 at 4. I have, again, carefully reviewed all affidavits and documentary evidence submitted by the parties in support of their respective positions, and find no basis for Complainant's contention. Complainant declined to identify which fact he believes I neglected to consider when dismissing his case for untimeliness. Alternatively, Complainant insists that there are outstanding genuine issues of material fact that warrant a hearing on the timeliness issue.

First, Complainant argues that contradictory statements exist between statements made by him in his affidavit to OSHA and assertions made by Respondents in their Memorandum of Law. See Motion 2 at 2. Complainant represented to OSHA that Mr. Laurito did not respond to Complainant's March 29, 2005 telephone call, in which Complainant informed Laurito that he was interested in the separation package, subject to modifications. Corbett Affidavit to OSHA at 8. Complainant argues that this is in "direct contradiction" to Respondents' position that Complainant never responded to Mr. Laurito. See Motion 2 at 2 (referencing RB at 3). A complete review of these two statements reveals that they are not contradictory. Respondents had asserted that Complainant failed to respond to Mr. Laurito by March 28, 2005, as directed by correspondence dated March 21, 2005. Complainant admittedly failed to contact Mr. Laurito until March 29, 2005, a day after the deadline set in the March 21 letter. Corbett Affidavit to OSHA at 8. Mr. Laurito's affidavit corroborates this event. Laurito Affidavit at 5. Complainant asserted in his affidavit to OSHA that he had never heard back from Mr. Laurito *after* the March 29, 2005 phone call. Thus, there is no apparent contradiction. Moreover, Complainant's assertion that he did not hear from Mr. Laurito after the March 29, 2005 phone call is inaccurate, as he admittedly received Laurito's letter of March 31, 2005.

Complainant next argues that I erred in finding that Complainant should have known on March 31, 2005, that Respondents were not willing to change the terms of the separation agreement. Motion 2 at 2-3. Complainant reasons that because the March 31 letter included a statement by Mr. Laurito that Respondents were not inclined to change any of the *economic components* of the agreement, it may be inferred that Respondents might have been willing to change other elements. Complainant argues that if Respondents were unwilling to change *any* component, they would have stated such intention. I am not persuaded by this argument. It is clear from Complainant's affidavit to OSHA that he fully understood that Respondents were not willing to negotiate any of the terms of the Separation Agreement. See Corbett Affidavit to OSHA at 8; Modifications to Statement (Complainant stated as follows: "They said that I could *take the agreement as is*. The agreement demanded that I acknowledge that I had performance issues. That was not true and I refused to sign the agreement understanding that the language of

the letter dictated discharge...”) (emphasis added). Complainant’s current assertion that he was waiting to hear further from Mr. Laurito is not reflected in earlier communications. Complainant’s statements to OSHA reveal that it was apparent to him after receiving the March 31, 2005 letter that his discharge and termination were imminent upon failure to accept the Separation Agreement. I decline to reconsider my finding that it was at that point in time when Complainant became aware of his alleged discriminatory discharge.

Complainant also argues that because Respondents previously conceded that the complaint was timely filed, they should be estopped from taking a contrary position to that which they previously stated. Motion 2 at 3. However, because neither party may waive jurisdiction, that allegation is baseless. In the instant matter, Respondents did not raise the issue of timeliness; I did. I am obliged to inquire *sua sponte* whenever a doubt arises as to the existence of its jurisdiction. See Mt. Healthy City Sch. Sist. Bd. of Edu. V. Doyle, 429 U.S. 274, 278 (1977).

Complainant argues that he should be afforded the opportunity to depose the OSHA investigator, maintaining that it would be beneficial for me to hear why the OSHA investigator made the determination that the complaint was timely filed. Motion 2 at 4. Complainant misapprehends the adjudicatory process before OALJ. Hearings are conducted before OALJ as hearings *de novo*. 29 C.F.R. §1980.107(b). Therefore, OSHA’s findings are not binding on my decision. Furthermore, an ALJ is granted “broad discretion” to limit discovery in order to expedite the hearing. *Id.* The delay in procuring the investigator’s testimony would far outweigh its probative value in this matter. Accordingly, I find that this is not a sufficient ground warranting reconsideration or a hearing.

Complainant further contends that a hearing on the timeliness issue should be held because the truthfulness of Respondents’ affidavits is in question. Motion 2 at 4. Although I reviewed and considered all of the affidavits of record, I have applied the standard of summary judgment review, and have considered the evidence in the light most favorable to Complainant, who would be the non-moving party if Respondent had properly raised the issue of timeliness. The record evidence most instructive in this matter is the correspondence of March 21 and 31, 2005, and Complainant’s affidavit to OSHA. Although I also cited to Mr. Laurito’s affidavit in my initial Order Dismissing the Complaint, the statements to which I refer are consistent with Complainant’s affidavit (i.e. Complainant contacted Laurito on March 29, 2006; Laurito did not hear back from Complainant after that phone contact). See Laurito Affidavit at 5, ¶12; cf. Corbett Affidavit to OSHA at 8. Complainant has not questioned the veracity of the letters of March of 2005, and indeed, admittedly received and apparently understood them. Therefore, having considered Respondents’ affidavits but finding that they were not determinative of the issue of timeliness, I based my Order upon undisputed facts of record. Accordingly, I find that a hearing for the purpose of inquiry into the veracity of Respondents’ affidavits is not warranted.

In support of his supplemental motion, Complainant submitted evidence for the first time in support of his contention that he is entitled to equitable tolling of the time within which he was to file his complaint with OSHA. In consideration of this evidence, I find it appropriate to review my Order dismissing his case.

In cases under the Act, the Appellate Review Board (“ARB”) has adopted the principle of equitable tolling of statutory time limits that was applied in School Dist. of City of Allentown v. Marshall, 657 F.2d 16, 19-21 (3rd Cir. 1981). See, Moldauer v. Canandaigua Wine Co., ARB No. 04-022, ALJ No. 2003-SOX-00026, slip op. at 6 (ARB Dec. 30, 2005). The ARB recognized the Court’s finding of “three principal situations in which equitable modification may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum”. Moldauer, supra. at 6; Halpern v. XL Capital, Ltd., ARB No. 04-120, ALJ No. 2004-SOX-0054, slip op. at 4 (ARB Aug. 31, 2005). Complainant bears the burden of establishing grounds for applying equitable modification of the statutory time limitation. See, Baldwin County Welcome Ctr. v. Brown, 446 U.S. 147, 151 (1984).

Complainant argues that because he filed a formal complaint with the National Labor Relations Board (“NLRB”) on April 29, 2005, that includes the allegations he later raised with OSHA, then equitable tolling applies. I acknowledge that Complainant’s complaint with the NLRB was filed within the statutory ninety day period, based upon my determination that the March 31, 2005 letter placed Complainant on notice of his alleged discriminatory discharge. Therefore, a complaint alleging violations of SOX that was filed in the wrong forum on April 29, 2005 could be deemed to have been timely filed. See, 18 U.S.C.A. §1514A(b)(2)(D). However, in order for equitable tolling to apply, Complainant must establish that he filed the precise statutory claim in the wrong forum.

The Supreme Court of the United States observed that although the purposes of a statute of limitations is to protect defendants from recurrent claims, such purposes are not undermined where a party’s defective filing of a claim is also filed in the correct forum. Burnett v. New York Cent. RR Co., 380 U.S. 424 (1965). In Burnett, the plaintiff filed a claim based upon the exact same statutory remedy in both state and federal courts. Id. However, the Court declined to extend its holding in Burnett to circumstances where similar claims, but not the exact causes of action, were filed in different forums. Johnson v. Roadway Express, Inc., 421 U.S. 454, 466 (1975). In that case, the Court held that although the same allegations were raised in complaints before the Equal Employment Opportunity Commission and in court under the Civil Rights Act of 1866, the underlying statutes were separate, distinct and independent. Id., at 466. The Court recognized that even where remedies provided by different statutes are related, and where the filing of one claim would provide adequate notice to a defendant, equitable tolling would apply only where the claims are identical. Johnson, supra. at 467.

I find that the circumstances presented herein more closely resemble the facts before the Court in the Johnson case. I find that Complainant’s complaint before NLRB was not brought in the wrong forum. Complainant’s affidavit filed in conjunction with that complaint, dated June 20, 2005 (“Complainant’s NLRB Aff.”) reflects that his complaints before that administrative body were chiefly directed at perceived violations in the negotiation of the agreement between Respondents and the IBEW (“Union”). See, Complainant’s NLRB Aff. Although the NLRB complaint included allegations of fraud by Respondents in the negotiation and execution of the labor agreement that Complainant alleges violated SOX, the gravamen of the NLRB complaint clearly establishes that NLRB was the proper party to consider Complainant’s allegations.

Complainant's position as Manager of Labor Relations for Respondents and his personal involvement in the labor contract negotiations further demonstrate that he was aware that NLRB had jurisdiction for his complaints regarding unfair practices in the negotiation of a labor agreement. Although Complainant's complaint to NLRB raised allegations of fraud that might be covered under the jurisdiction of SOX, Complainant cannot credibly argue that he intended to secure from NLRB the same remedies that SOX would provide.

I find that the complaint filed with NLRB and the complaint filed with OSHA are independent and distinct causes of action. The statutory remedies provided by the separate complaints are different, and do not diverge. I find that Complainant has failed to meet his burden of establishing grounds for equitable modification of the statutory period within which a complaint under SOX must be filed.

IV. CONCLUSION

Based upon the foregoing, I find that Complainant has failed to establish a basis for reconsideration of my Order or for argument on the issue.

ORDER

For the reasons stated herein, the motion for reconsideration of MARK CORBETT is DISMISSED.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS:

To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. §1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must

also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§1980.109(c) and 1980.110(a) and (b).