



Issue Date: 26 January 2009

CASE NO.: 2006-SOX-00017

In the Matter of:

**MICHAEL DAVIS,
Complainant,**

v.

**THE HOME DEPOT INC.,
Respondent.**

ORDER OF DISMISSAL

On December 16, 2008, Complainant Michael Davis filed “Complainant’s Notice of Intention to File a Complaint in Federal Court” in this matter, which arises under the employee protection (whistleblower) provisions of the Sarbanes Oxley Act of 2002, 18 U.S.C. § 1514A. In the Notice, Complainant stated his intention to file a complaint against Respondent and bring an action in the United States District Court in Maryland after the passage of fifteen days, in accordance with 18 U.S.C. § 1514A(b)(1)(B). *See also* 29 C.F.R. § 1980.114(a). Accordingly, for the reasons set forth below, this matter is being dismissed without prejudice to its reinstatement if Complainant fails to file an action in federal district court.

Procedural Background

The lengthy procedural history behind this matter is summarized in the multiple previous Orders issued by this tribunal, which are incorporated by reference herein. Briefly, I note the following:

- Complainant filed his complaint with the Secretary of Labor on or about June 23, 2005 and his objections to the Secretary’s Findings and request for a hearing before an administrative law judge were filed on November 1, 2005.
- The hearing in this matter commenced on April 18, 2006 and (following recesses) concluded on June 15, 2006.
- The record was, *inter alia*, reopened for the testimony of two witnesses, who provided additional testimony on May 16, 2007 and indicated inaccuracies in their previous testimony.
- To combat any prejudice, Complainant was allowed to call three witnesses – two of whom were listed as witnesses but were not called, and one of whom had previously

testified. Two of the witnesses appeared and testified on January 23, 2008. However, the third witness did not appear and specifically ignored a subpoena that had been served upon him.

- On June 27, 2008, the undersigned certified facts to the United States District Court for the District of Columbia, pursuant to 29 C.F.R. § 18.29(b) and requested that the Court compel the attendance and testimony of the recalcitrant witness before this tribunal and take appropriate action, as if the trial of this case had occurred before the United States District Court. However, by letter of July 17, 2008, Chief Judge Lamberth declined to act on the Order absent the participation of the U.S. Attorney's Office or the Department of Justice, pursuant to 28 U.S.C. § 516.
- The Assistant Secretary of Labor filed a motion with the Administrative Review Board on July 16, 2008, seeking to intervene for the purpose of appealing the June 27, 2008 Order, and on the same date filed a petition for interlocutory review of the Order. On July 22, 2008, based on the conclusion that the motion to intervene should have been filed in this tribunal, and that the Assistant Secretary could intervene at any time at any stage of the proceedings, the undersigned issued an Order permitting the Assistant Secretary to intervene for the purpose of seeking interlocutory review. Complainant's motion for reconsideration was denied.
- On September 29, 2008, the Administrative Review Board issued a "Final Decision and Order Dismissing Petition for Review." Although the ARB agreed that the motion should have been filed in this tribunal and the Assistant Secretary did indeed have the right to intervene, the ARB determined that there was no issue remaining to adjudicate because "Judge Lamberth's refusal to file the certification order and the ALJ's decision not to refile it have left the Board with no justiciable issue to decide."
- On November 19, 2008, the undersigned issued an "Order Denying Stay, Clarifying Record, and Establishing Briefing Schedule." The Order addressed housekeeping matters and issues concerning the record, provided for an alternative to the testimony of the recalcitrant witness, and established a briefing schedule.
- On December 16, 2008, Complainant filed "Complainant's Notice of Intention to File a Complaint in Federal Court."

Discussion

Section 806(b)(1) of the Sarbanes-Oxley Act, relating to enforcement, provides:

(1) IN GENERAL- A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by--

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

18 U.S.C. § 1514A(b)(1). The regulatory counterpart to the statutory provision appears at 29 C.F.R. § 1980.114(a) and specifies that the pertinent inquiry is whether a final decision has been issued by the Administrative Review Board, to which the Secretary's authority has been delegated under Secretary's Order 1-2002, issued on September 24, 2002, 67 Fed. Reg. 64272-64273 (Oct. 17, 2002). The regulations also require a complainant to file a notice with the administrative law judge or the Administrative Review Board, as appropriate, of his or her intention to file a complaint in federal court, fifteen days in advance of filing such an action. 29 C.F.R. § 1980.114(b).

Here, no decision has been issued within the specified 180 days and, as shown by the above chronology, the delay was not caused by bad faith of the Complainant. Complainant therefore has a right to file a complaint in federal district court. 18 U.S.C. § 1514A(b)(1); 29 C.F.R. § 1980.114(a). If the Complainant commences an action in federal district court, the Secretary of Labor will no longer have jurisdiction over this action. *See Stone v. Duke Energy Corp.*, 432 F.3d 320 (4th Cir. 2005) (case below 2003-SOX-12). To date, this tribunal has not received notice that Complainant has filed an action in federal district court. Some administrative law judges have required that the complainant submit a copy of the complaint filed with the appropriate U.S. District Court before dismissing the action; others have not. *Compare, e.g., Evans v. Liberty Medical Supply, Inc.*, 2007-SOX-22 (ALJ, July 2, 2007) with *Miley v. Emerachem, LLC*, 2007-SOX-31 (ALJ, June 15, 2007). Others have simply closed the file subject to reopening. *E.g., Roberts v. Weatherford International, Ltd.*, 2008-SOX-69 (ALJ Sept. 25, 2008). Based upon Complainant's representations that he intends to file an action in federal district court, this case is being dismissed. In the event that the Complainant fails to file an action in federal district court, any party may move to set aside this Order of Dismissal and reopen these proceedings.

ORDER

IT IS HEREBY ORDERED that the complaint filed by Complainant Michael Davis under the Sarbanes-Oxley Act is **DISMISSED WITHOUT PREJUDICE** to its reinstatement if an action is not filed in federal district court.

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.