



Issue Date: 27 March 2006

CASE NO.: 2006-SOX-00034

In the Matter of

KEVIN M. DAY,
Complainant

v.

STAPLES, INC.,
Respondent

ORDER DISMISSING COMPLAINT

This matter arises from a complaint of Kevin M. Day (the Complainant), filed on September 28, 2005 with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Staples, Inc. (the Respondent) violated the employee protection (whistleblower) provisions of 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 ("Sarbanes-Oxley" or "Act") by terminating his employment in retaliation for activity protected by the Act. OSHA investigated the complaint and notified the Complainant by letter dated November 23, 2005 of its determination that his allegations could not be substantiated. The Complainant filed a timely request with the Office of Administrative Law Judges (OALJ) for a formal hearing which was originally noticed to convene on January 13, 2006.

The hearing was subsequently continued to give the undersigned adequate time to review and rule on the parties' motions for summary decision. On January 27, 2006, the motions for summary decision were denied based on my finding that a genuine issue of material fact remained as to whether Complainant engaged in activities protected by Sarbanes-Oxley. By separate notice issued on January 27, 2006, the hearing was rescheduled to convene on February 10, 2006. On February 1, 2006, the parties jointly moved to postpone the hearing until March 3, 2006 to allow for completion of discovery. The motion was allowed, and the hearing was rescheduled to March 3, 2006.

The hearing convened in Boston, Massachusetts on Friday, March 3, 2006. Complainant appeared represented by counsel, and appearances were made by in-house counsel and outside counsel on behalf of the Respondent. In addition to testimony, documentary evidence was admitted at the formal hearing.¹ The Complainant's testimony was completed on the first day of

¹ Jurisdictional and procedural documents were admitted as Administrative Law Judge Exhibits 1-33 (ALJX 1-33);

the hearing which adjourned after 5:00 p.m. The hearing was reconvened on Monday, March 6, 2006. The Complainant offered a number of exhibits and he rested at approximately 11:15 a.m. The Respondent called two of the five witnesses designated in its pre-trial disclosure. Direct examination of the second witness, Mary-Ellen Julio who was the Complainant's direct supervisor, was completed after 5:00 p.m. The Respondent stated that it was willing to continue the hearing into the evening so that cross-examination of Ms. Julio witness could be completed, stating that Ms. Julio had a serious medical condition and that her availability in the future was not certain. The Court adjourned the hearing, however, based on the representation of the Claimant's attorney that his cross-examination would require more than one hour.² The Court noted that the Respondent still had three witnesses to call and indicated that it would be willing to schedule a special session at an alternate location in order to complete Ms. Julio's cross-examination at a time and place compatible with her medical needs. Accordingly, the hearing was adjourned, and the parties' attorneys were instructed to discuss and advise the Court of available dates over the next several weeks for completing the hearing. There was also discussion, both on and off the record, of whether the Complainant would be agreeable to waiving his right to remove the case to the district court pursuant to 18 U.S.C. § 1514A(1) in light of the likelihood that the need for additional hearing dates would prevent issuance of a final decision within 180 days from the date on which he filed his complaint. The Complainant's attorney indicated that he was likely to waive his right to remove to district court but added that he did not wish to waive this right without fully exploring it.

On March 14, 2005, the Complainant filed a Notice of Intent to File a Complaint in the U.S. District Court. *See* 29 C.F.R. § 1980.114(b). By letter dated March 17, 2006, the Respondent objected to the Complainant's notice and urged this Court to reject the Complainant's attempt to remove his complaint to district court.

Under the Act, a complainant can remove his case to federal district court "if the Secretary [of the Department of Labor] 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." 18 U.S.C. § 1514A(1). Since the hearing in this matter has not been completed, no final agency decision will be issued by March 27, 2006 which marks the expiration of the 180-day period. In view of these circumstances, the administrative law judge has no jurisdiction "to enter any order in the case other than one dismissing it on the ground that [the Complainant] had removed the case to district court." *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-138, ALJ No. 2005-SOX-00065, USDOL/OALJ Reporter (PDF) at 5 (ARB Oct. 31, 2005). *See also Stone v. Duke Energy Corp.*, 432 F.3d 320, 322-323 (4th Cir. 2005).

Complainant's submissions were admitted as Complainant's Exhibits (CX) 1-3, 5-7, 10, 12-14 16-33, 36-64; and Respondent's submissions were admitted as Respondent's Exhibits 1-22 (RX 1-22). CX 7-9 were admitted for the limited purpose of establishing Respondent's knowledge of potential litigation and the admissibility of CX 4 and CX 11 were taken under advisement.

² The parties had been previously informed that non-emergency lighting in the O'Neill Federal Building is shut off at 6:00 p.m. unless prior arrangement is made with the building manager for extended hours lighting. Neither party raised the possibility of continuing the hearing beyond 6:00 p.m. on March 6, 2006 until after 5:00 p.m., at which point the building manager's office was closed.

Accordingly, the complaint filed by Kevin Day with the Department of Labor on September 28, 2005 is **DISMISSED** as the Complainant has removed the case to district court pursuant to 18 U.S.C. §1514A(1).

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts