

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 May 2011

Case No.: 2006-SOX-00041

In the Matter of:

JACK R. T. JORDAN,
Complainant,

v.

SPRINT NEXTEL CORPORATION, *et al.*,
Respondents.

ORDER OF DISMISSAL

The above-captioned matter arises under the employee protection provisions of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A. Complainant filed his initial complaint with the Occupational Safety and Health Administration on April 11, 2005. On May 17, 2011, Complainant submitted a Notice of Intent to Proceed De Novo in U.S. District Court pursuant to 29 C.F.R. § 1980.114. On May 18, 2011, Respondents filed a Motion to Further Compel Complainant's Responses to Interrogatories and Requests for Production and for Sanctions, Including Dismissal, and requested expedited consideration of their motion. In light of my conclusion that this matter must be dismissed in response to Complainant's notice of intent, I deem it unnecessary to await Complainant's response, if any he has, to Respondents' motion.

The applicable statute and regulation provide that where the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint, the complainant may bring an action in U.S. district court for de novo review so long as there is no showing of delay due to bad faith by the complainant. 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114(a). The regulations require the complainant to provide, fifteen days in advance, notice of the intent to file to the administrative law judge or the Board. 29 C.F.R. § 1980.114(b).

This complaint has been pending for more than 180 days and Complainant has provided the requisite notice. At issue is whether the delay in reaching a final decision is attributable to bad faith on the part of Complainant. Respondents argue that Complainant's bad faith is clear from his recent actions in failing to comply with two orders to produce discovery, and his failure otherwise to produce discovery. As a result, argue Respondents, Complainant has had the advantage of receiving discovery from them while producing none, and they argue that he should not be permitted to "opportunistically invoke[] district court jurisdiction" under these circumstances.

I find the following facts to be true based on the case file and the declaration attached to Respondents' motion:

1. Complainant filed his complaint with OSHA on April 11, 2005.
2. OSHA dismissed the complaint on December 21, 2005, and Complainant timely filed objections and a request for hearing on December 28, 2005.
3. On February 7, 2006, Respondent Sprint Nextel ("Sprint") served its First Set of Requests for Production of Documents on Complainant. Complainant did not respond to that discovery request.
4. On February 10, 2006, Sprint filed a motion to dismiss the complaint. The ALJ to whom the matter was then assigned denied the motion on March 14, 2006, but certified the issue to the ARB.
5. The ARB affirmed the ALJ's denial of Sprint's motion to dismiss on September 30, 2009.
6. The case file was returned to the Office of Administrative Law Judges on April 23, 2010.
7. On February 2, 2011, Sprint served its Second Set of Interrogatories and Second Set of Requests for Production of Documents on Complainant. Complainant did not respond to those discovery requests.
8. On March 23, 2011, Sprint moved to compel Complainant to respond to its discovery requests of February 7, 2006 and February 2, 2011. Complainant did not directly oppose Sprint's motion.
9. On April 14, 2011, I granted Sprint's motion to compel and ordered Complainant to respond without objection no later than April 27, 2011 to the discovery requests served by Sprint on February 7, 2006 and February 2, 2011.
10. On April 26, 2011, Complainant filed a motion for reconsideration of my order of April 14, 2011.
11. On May 6, 2011, I reconsidered and reaffirmed my order of April 14, 2011, while revising the schedule for conducting depositions and filing dispositive motions.
12. On May 12, 2011, counsel for Respondents contacted Complainant by email and informed him that because he had not complied with my previous orders, Respondents intended to file a further motion to compel and for sanctions, and invited Complainant to provide them with any information he wished them to consider before they filed such a motion.
13. On May 13, 2011, Complainant responded to counsel's email, representing that he had been extremely busy at work performing the duties of two positions and had been therefore unable to respond to Sprint's discovery requests. He also represented that he would provide "at least some" responses "next week"; i.e., the week of May 15, 2011. He did not do so, as of May 18, 2011.

A review of the cases addressing this component of the statute is of little assistance, as they do little more than illustrate situations where bad faith has not been shown. In *Vroom v. General Electric Company*, ARB Case No. 10-121, ALJ Case No. 2010-SOX-019 (ARB November 8, 2010), the Administrative Review Board found that although the complainant "amended his complaints, changed respondents, and took procedural steps to extend the life of

his case,” these actions did not amount to a showing of a bad-faith, intentional attempt to “run out the [180-day] clock.” The ARB determined that the complainant

did not employ these tactics in a concerted attempt to prolong the litigation so that he could file in district court before the administrative litigation was completed because he waited an additional six months after the 180-day period expired to indicate his intention to file in district court – hardly the actions of a party who has prolonged the litigation in bad faith so that he could race to district court before the Department issued its final decision.

Vroom, slip op. at p. 3. Likewise, in *Moldauer v. Constellation Brands, Inc.*, ARB Case No. 09-042, ALJ Case No. 2008-SOX-073 (ARB March 9, 2009), the ARB held that the complainant’s two failures respond to an ALJ’s order to show cause, instead requesting a stay of proceedings, did not show that any bad faith on his part caused the delay in resolution of the case. *Id.*, slip op. at p. 2.

I cannot conclude that the circumstances of this case are sufficiently more egregious than those of *Moldauer* or *Vroom* to show that any delay in resolution was caused by bad faith on the part of Complainant. First, the relevant discovery deadlines and deadlines for filing dispositive motions were not established until the telephonic conference of January 28, 2011. At that time, the parties agreed to a discovery cutoff date of April 27, 2011, and a briefing schedule for filing dispositive motions ending on June 13, 2011. Complainant’s failure to respond to Sprint’s discovery requests was not then at issue. After Complainant failed to respond timely to Sprint’s discovery requests, and Sprint’s motion to compel was granted, the schedule was revised to allow for depositions to take place by August 19, 2011, and for briefing on dispositive motions to be concluded by October 14, 2011. The potential delay attributable to Complainant’s disregard of his discovery obligations, therefore, was no longer than four months. That delay, however, may have been significantly shorter had Sprint opted to file a motion for evidentiary sanctions and summary decision after Complainant did not comply with my orders to produce discovery. Even if Sprint had done so, however, the critical date for determining whether there has been a delay in reaching a final decision is the date of the Secretary’s final decision. The Secretary has delegated the authority to issue final decisions to the ARB.¹ Whether Complainant’s actions have contributed to a delay in the ARB’s final decision is speculative at best. To the extent that they have, that delay (four months at maximum) is brief in relation to the delay caused by Respondents’ interlocutory appeal to the ARB (four years).² In addition, Complainant did not file his notice of intent for over five years after the case arrived in this Office – as in *Vroom*, *supra*, “hardly the actions of a party who has prolonged the litigation in bad faith so that he could race to district court before the Department issued its final decision.”

¹ Secretary’s Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1980.110(a)(2010).

² Although I have concluded that Respondents have not demonstrated that Complainant has caused an appreciable delay in the Department of Labor reaching a final decision, my conclusion is in no way binding on a district court’s determination of its jurisdiction over the complaint. See *Collins v. Beazer Homes USA, Inc.*, 334 F.Supp.2d 1365, 1374 (N.D.Ga. 2004) (district court lacks jurisdiction if delay is due to bad faith on Complainant’s part); *Murray v. TXU Corp.*, 299 F.Supp.2d 799, 802 (N.D.Tex. 2003) (same).

Accordingly, Complainant has met the conditions for filing a *de novo* action in United States District Court, and his complaint will be dismissed. Dismissal will be without prejudice to reinstatement should a district court complaint not be filed.

Based on the foregoing, Sprint's motion to further compel responses to discovery and for sanctions including dismissal will be denied as moot. It is clear, however, that Sprint's motion has considerable merit in light of Complainant's utter and inexcusable failure to comply with his discovery obligations and with my orders compelling discovery.

ORDER

In light of the foregoing, IT IS ORDERED:

1. The complaint in the above-captioned matter is DISMISSED without prejudice to its reinstatement if an action is not filed in federal district court; and
2. Sprint's Motion to Further Compel Complainant's Responses to Interrogatories and Requests for Production and for Sanctions is DENIED as moot without prejudice to its re-assertion if this matter is reinstated.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
Associate Chief Administrative Law Judge