

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 February 2006

Case No.: 2006-SOX-00006

In the Matter of:

ANDREA WILLIAMS
Complainant

v.

SIRVA, INC.
Respondent

ORDER DISMISSING
COMPLAINT ON SUMMARY DECISION

Complainant, Andrea Williams, filed a complaint against Respondent, Sirva, Inc., under the whistleblower protection provisions of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. §1514A. Complainant alleges that Respondent took adverse actions against her and constructively discharged her after she refused to participate in random telephone questioning by the California Department of Insurance. Claimant originally filed her complaint with the Secretary of Labor who found it lacked merit. On October 24, 2005, Claimant appealed to the Office of Administrative Law Judges for a *de novo* review. A formal hearing is scheduled for February 22, 2006. On January 31, 2006, Respondent filed a Motion for Summary Decision. Complainant promptly responded and Respondent filed a reply.

Summary Judgment Standard

The Rules of Practice and Procedure for administrative hearings are set forth at 29 C.F.R. Part 18. Summary Judgment can be granted "if the pleadings, affidavits, material obtained by discovery...or matters officially noticed show that there is no genuine issue as to any material fact." 29 C.F.R. § 18.40(d). Respondent as the moving party has the burden to prove Claimant's case lacks evidence to support her claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden then shifts to the non-moving party (the Complainant) to bring forth evidence illustrating a genuine issue of material fact does exist. *Id.* The Court must look at the record as a whole and determine whether the fact finder could rule in Complainant's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The evidence must be construed in favor of the non-moving party (the Complainant). *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001). However, "if the non-moving party fails to sufficiently show an essential element of [her] case, there can be 'no genuine issue as to any material fact,'

since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.” *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35, slip op. at 5 (ARB September 30, 2005), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Findings of Fact and Conclusions of Law

18 U.S.C.A. § 1514A of the Sarbanes-Oxley Act is designed to hold publicly traded companies responsible for fraudulent activity. Section 1514 is a whistleblower provision that provides protection for employees of these publicly traded companies who provide information or assist in the investigation of conduct which the employee reasonably believes constitutes a fraudulent activity that violates federal law. 18 U.S.C. § 1514A(a)(1). The Act protects those employees of companies “with a class of securities registered under Section 12 of the Securities Exchange Act of 1934.” *Id.* Complaints under this provision are filed with the Secretary of Labor, who is to investigate and adjudicate the matter. 49 U.S.C.A. § 42121(b) of the Wendell H. Ford Aviation Investment and Reform Act sets forth the standards of proof in a Section 1514A claim. 18 U.S.C.A. § 1514A(b)(2)(C). “Accordingly, to prevail, a complainant must prove that: (1) the complainant engaged in a protected activity; (2) the respondent knew that the complainant engaged in protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.” *Reddy*, ARB No. 04-123, p.7. If a complainant proves all four elements the burden shifts to the employer to prove by clear and convincing evidence that it would have taken the same action had the protected activity not occurred. *Bechtel v. Competitive Tech., Inc.*, ALJ No. 2005-SOX-00033, p. 26 (October 5, 2005).

Complainant was an insurance adjuster for the Respondent between March 2004 and June 17, 2005. Complainant states in her complaint that on September 29, 2005, her supervisor provided her with a list of questions and answers to use when the California Department of Insurance called to randomly investigate Respondent's insurance fraud prevention methods. Complainant alleges that some of the answers to the questions were incorrect, and therefore, she informed her supervisor that she would not participate in the telephone calls. Although Complainant's supervisor agreed, Complainant contends that as a result of her actions, Respondent discriminated against her, harassed her and constructively discharged her.

In its Motion for Summary Judgment, Respondent first contends that Complainant was not engaged in a protected activity under Section 1514A. (*See* Respondent's Motion p.16). Respondent argues that Complainant's decision not to participate in the telephone questioning has no relationship to federal securities law or any other federal law relating to fraud against shareholders. Respondent argues that Complainant's actions only relate to possible California state insurance law violations. (*See Id.*). Complainant responded by arguing that her action not to participate in the telephone questioning and informing her supervisor of the possible state law violations does constitute a protected activity under Section 1514A, because she had a reasonable belief the answers to the questions would be a violation of the law. (*See* Complaint's Response, pp. 6-7).

Complainant has failed to present evidence establishing that her participation in the telephone questioning would have been a violation of federal law. Complainant only provided evidence that the incorrect answers her supervisor wanted her to provide could have been a violation of California state law. However, “the Act does not provide protection to employees who report violations of state statutes or laws.” *Allen v. Stewart Enterprises, Inc.*, ALJ No. 2004-SOX-61, 62, and 63, at p. 86 (February 15, 2005). Specifically, Section 1514A provides, a protected activity includes only those reports of violations of “section 1341, 1343, 1344, or 1348, 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) (emphasis added). Complainant failed to provide evidence that the Respondent’s actions would have violated a federal law or statute. Therefore, as a matter of law Complainant was not involved in a protected activity under Section 1514A.

ORDER

Since I have found that Complainant did not engage in a protected activity, she failed to establish a material element of her claim and as a result, her whole claim fails. Therefore, IT IS HEREBY ORDERED that Respondent’s Motion for Summary Decision is hereby GRANTED and Complainant’s complaint is DISMISSED with prejudice. IT IS FURTHER ORDERED that the hearing scheduled for February 22, 2006 is canceled.

A

JOSEPH E. KANE
Administrative Law Judge

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).