

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 May 2010

CASE NO.: 2010-SOX-00030

In the Matter of:

RICHARD B. FAGAN

Complainant

v.

MASS MUTUAL LIFE INVESTORS SERVICES, INC.

Respondent

Appearances:

Richard B. Fagan, *pro se*

Albert Zakarian, Esq. and Jeffrey A. Fritz, Esq.; Day Pitney LLP, Hartford, Connecticut for the Respondent

Before: Jonathan C. Calianos, Administrative Law Judge

**ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
AND CANCELLING HEARING**

I. Procedural Background

This proceeding arises from a complaint of discrimination filed by Richard Fagan (“the Complainant” or “Fagan”) against Mass Mutual Life Investors Services, Inc. (“the Respondent” or “Mass Mutual”) under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (“Sarbanes-Oxley” or “SOX”) and the procedural regulations found in 29 C.F.R. Part 1980. Fagan filed a complaint with the Occupational Safety and Health Administration of the U.S. Department of Labor (“OSHA”) alleging that he was discharged because he raised concerns to Mass Mutual regarding possible mismanagement of a client’s inherited IRA brokerage account. In a letter dated February 2, 2010, the Regional Administrator for OSHA, acting as an agent for the Secretary of Labor (“Secretary”), found that the complaint was untimely and dismissed the complaint. OSHA No. 1-1270-10-004 (February 2, 2010).

On March 12, 2010, Fagan filed a notice of appeal objecting to the Secretary’s findings and requested a *de novo* hearing before the Office of Administrative Law Judges (“OALJ”)

pursuant to 29 C.F.R. § 1980.106. On March 19, 2010, I issued a Notice of Hearing and Pre-Hearing Order setting forth various deadlines and scheduling the matter for a formal hearing in Hartford, Connecticut on June 16, 2010. On April 9, 2010, the Respondent filed a Motion to Dismiss and to Stay Discovery, Deadline for Filing Motion for Summary Decision, and Hearing (“Motion to Dismiss”). Mass Mutual argues that the complaint ought to be dismissed because it was filed more than 90 days after any adverse employment action was taken by Mass Mutual. On April 20, 2010, the Complainant filed an opposition. On April 27, 2010, I conducted an off-the-record telephone conference on the Motion to Dismiss. On April 29, 2010, I issued an Order Setting Deadline until May 7, 2010 for the parties to file any supplemental memoranda concerning the notice and equitable tolling issues raised during the telephone conference. On May 3, 2010, Mass Mutual filed a Supplemental Memorandum of Law in Support of Respondent’s Motion to Dismiss. Fagan did not file any supplemental memoranda.

For the reasons set forth below, I find that Fagan’s complaint was not filed within 90 days of the alleged adverse action as required by SOX. Therefore, his complaint is untimely and is hereby **DISMISSED WITH PREJUDICE**.

II. Background¹

Fagan worked for Mass Mutual as a customer service representative in the company call center. Fagan alleges that on or about October 18, 2008, he became aware of two Mass Mutual employees mismanagement of a client’s inherited IRA brokerage account. Fagan claims that the mismanagement resulted in a large financial loss to the client. He further alleges that he brought his concerns to Mass Mutual and it took no action on his claims of mismanagement. Approximately five months later, on March 20, 2009, Fagan found out that the client filed a lawsuit against Mass Mutual, and on March 22, 2009, Fagan was terminated from his employment effective March 24, 2009. Fagan alleges that his termination was done in an attempt to prevent him from testifying in the pending lawsuit.

On January 11, 2010, over 90 days after the effective date of his termination, Fagan filed his complaint with OSHA under the employee protection provisions of SOX.

III. Discussion

A. Motion to Dismiss

Although the Rules of Practice and Procedure for Administrative Hearings before the OALJ does not address a motion to dismiss, the Federal Rules of Civil Procedure “shall be applied in any situation not provided for” by the rules. 29 C.F.R. § 18.1(a). Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move for dismissal on the grounds that a complaint does not state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). “Although the Rule refers to such dismissal on the motion of a party, it has been uniformly held that a Court may dismiss a complaint for failure to state a claim upon which relief can be granted

¹ The relevant background is taken from Fagan’s notice of appeal objecting to the Secretary’s findings and the Respondent’s Motion to Dismiss.

when it is patently obvious that the complainant could not prevail on the facts as alleged in the complaint.” *Hickernell v. Penske Truck Leasing, Inc.*, 2008-SOX-00025 at 3 (A.L.J. April 17, 2008). The Court must determine whether, even assuming that all of a complainant’s allegations are true, he has stated a cause of action upon which relief can be granted. *Id.*

B. SOX Whistleblower Complaint

SOX encompasses many statutes and schemes aimed at investor protection goals, and the whistleblower protections found at 18 U.S.C.A. § 1514A are a relatively small portion of the Act. *See Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 5 (1st Cir. 2006), *cert. denied* 548 U.S. 906 (2006). The statute which controls the instant proceeding protects “employees of publically traded companies” who lawfully “provide information ... or otherwise assist in an investigation regarding any conduct which the employee believes constitutes a violation” of federal statutes prohibiting various frauds (specifically bank, mail, securities, and wire frauds), any rule or regulation of the Securities and Exchange Commission (“SEC”), or any other provision of federal law relating to fraud against shareholders. 18 U.S.C.A. § 1514A²; *see also Carnero*, 433 F.3d at 5; *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 04-149, ALJ No. 2004-SOX-11 at 1 n.1 (ARB May 31, 2006). “The § 1514A whistleblower provision ... serves to ‘encourage and protect [employees] who report fraudulent activity that can damage innocent investors in publicly traded companies.’” *Day v. Staples, Inc.*, 555 F.3d 42, 52 (1st Cir. 2009) (quoting S. Rep. No. 107-146, at 19); *see also* 148 Cong. Rec. S7420, 2002 WL 1731002 (daily ed. July 26, 2002).

An employee alleging retaliation under SOX must file a complaint within 90 days of the date on which the alleged violation occurred. 18 U.S.C.A. § 1514A(b)(2)(D); 29 C.F.R. 1980.103(d). “[The] limitations period begins to run from the time that the complainant knows or reasonably should know that the challenged act has occurred.” *Snyder v. Wyeth Pharmaceuticals*, USDOL/OALJ Reporter (PDF), ARB No. 09-008, ALJ No. 2008-SOX-00055 at 6 (ARB April 30, 2009) (citing *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 692 (11th Cir. 1982)).

² 18 U.S.C.A. § 1514A(a) provides in relevant part:

No company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of ... [18 U.S.C. §§] 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee...; or

(2) to file, cause to be filed...or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of [18 U.S.C. §§] 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal Law relating to fraud against shareholders.

“Thus, an employer violates SOX on the date that it communicates to the employee its intent to take an adverse employment action, rather than the date on which the employee experiences the adverse consequences of the employer’s action.” *Id.* (citation omitted). The limitations period runs from the date the employee receives “final, definitive, and unequivocal notice” of an adverse employment action. *Coppinger-Martin v. Nordstrom, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 07-067, ALJ No. 2007-SOX-00019 (ARB Sept. 25, 2009) (citations omitted).

Fagan received final, definitive, and unequivocal notice of his termination on March 22, 2009. His employment ended on March 24, 2009. To qualify for whistleblower protection under SOX, he must have filed his Complaint with OSHA no later than 90 days after the decision to terminate his employment was communicated to him. He simply failed to do so. Fagan filed his Complaint with OSHA on January 11, 2010, almost 300 days after his termination. Accordingly, I find that the Complaint is untimely filed, and Fagan has failed to show that he is entitled to relief from the untimely filing.

IV. ORDER

After consideration of the evidence and arguments presented, I find that Fagan’s Complaint is untimely filed and the Complaint is **DISMISSED WITH PREJUDICE**. The formal hearing scheduled for June 16, 2010 in Hartford, Connecticut is **CANCELLED**.

SO ORDERED.

A

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts