

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 23 June 2014**

CASE NO. 2010-SOX-00011

*In the Matter of*

**TIMOTHY HENDERSON,**  
Complainant,

v.

**MASCO FRAMING CORP./  
ERICKSON CONSTRUCTION,**  
Respondent.

Appearances: Ian E. Silverberg, Esq.  
for Claimant

Rick D. Roskelley, Esq.  
Littler Mendelson  
for Employer

Before: Steven B. Berlin  
Administrative Law Judge

**DECISION AND ORDER DISMISSING COMPLAINT**

With this Sarbanes-Oxley whistleblower case set for hearing on May 5, 2014, the parties filed a stipulation for dismissal with prejudice on April 7, 2014. It thus appeared that the parties had resolved their dispute. On April 8, 2014, I vacated the hearing and notified the parties that they were required to submit appropriate papers for the administrative law judge's review and approval, regardless of whether Complainant was withdrawing the claim or the parties were settling. *See* 29 C.F.R. §§ 1980.111(c), (d)(2). I required the parties to submit their papers within 10 days.

When the parties did not respond after six weeks, I issued an Order to Show Cause. I required that, on or before June 16, 2014, each party have on file in this Office a memorandum of points and authorities to show why I should not do one of the following: (1) strike the complaint and dismiss the claim, ordering that Complainant take nothing; (2) strike the answer, finding

Respondents liable, and allowing Complainant to prove up his damages, including reasonable attorney's fees; or (3) set the matter for a hearing on the merits. I ordered that any party failing to respond timely would be deemed to have waived his or its objections to each of these three alternative courses.

On June 18, 2014, the parties filed an untimely joint response. They stated for the first time that, more than three years ago, on February 8, 2011, Complainant filed a complaint in the United States District Court (D. Nev.), exercising his right to pursue this Sarbanes-Oxley claim in that forum. They asserted that right arose when the claim had been pending before the Department of Labor for more than 180 days. *See* 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114(a).

But the Act's implementing regulations required more at that time. Any complainant who was exercising the right to a trial *de novo* in the district court was required, not only to allow the Secretary of Labor 180 days to reach a final decision, but also to file notice with the administrative law judge at least fifteen days in advance of filing the district court complaint. *See* 29 C.F.R. § 1980.114 (prior to Nov. 3, 2011).<sup>1</sup>

Here, Complainant failed to file the required notice prior to filing the district court complaint. He failed to file it after receiving this Office's notice on November 5, 2013 that the matter would be heard on April 16, 2014. He failed to file it after receiving notice on January 23, 2014, that the hearing date had been rescheduled for May 5, 2014. On April 7, 2014, when he moved for a dismissal, he still said nothing about the matter's being litigated before the district court. He neglected to mention that, as I discuss below, the district court had already dismissed the action with prejudice two months earlier. When ordered to submit settlement papers, he failed to respond with any information. Only after the Order to Show Cause did Complainant's counsel give this Office the required notice that he had filed a complaint with the district court.

Meanwhile, the district court had ordered the parties to binding arbitration nearly three years ago, on July 22, 2011. Following the arbitration, the Court dismissed the Sarbanes-Oxley complaint with prejudice on February 7, 2014. Unbeknownst to this Office, which was still scheduling hearings and issuing orders, this claim thus had been litigated to a conclusion before the district court.

Complainant's failure to notify this Office timely or at all of his commencement of an action in the district court raises a question whether Complainant properly invoked the district court's jurisdiction. It appears that the failure to notify this Office is a failure to comply with one of the administrative prerequisites to filing a district court action.<sup>2</sup> *See* 29 C.F.R. § 1980.114(b). The

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<sup>1</sup> As the regulation provided in pertinent part prior to November 3, 2011: "(b) Fifteen days in advance of filing a complaint in federal court, a complainant must file with the administrative law judge . . . a notice of his or her intention to file such a complaint." 29 C.F.R. § 1980.114(b) (prior to Nov. 3, 2011). The amended regulation now provides that the complainant must file with the administrative law judge a copy of the district court complaint within seven days after filing it with the court. Both versions thus require prompt notice to the administrative law judge of any district court complaint.

<sup>2</sup> The other administrative prerequisite is the 180-day waiting period. *See* 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114(a).

parties' request notwithstanding, I find no basis to waive this administrative pre-filing requirement.<sup>3</sup>

Accordingly, all parties and their respective counsel are ordered to file with the U.S. District Court (D. Nev.), Hon. Larry R. Hicks, U.S. District Judge, a copy of this Order in Case No. 3:11-cv-00088-LRH-WGC, for the Court's determination of any jurisdictional issues.

The parties' request that this matter be DISMISSED with prejudice in this forum is GRANTED.

This Order is certified for publication.

SO ORDERED.

STEVEN B. BERLIN  
Administrative Law Judge

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<sup>3</sup> The parties misplace their reliance on 29 C.F.R. § 1980.115 for the proposition that Complainant's failure to notify this Office should be waived. That regulation is limited to "special circumstances not contemplated by the provisions of [the Sarbanes-Oxley implementing regulations]" or good cause shown. The parties point to no special, unanticipated circumstances. Complainant's counsel's neglect is not good cause, whether or not inadvertent.