

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 January 2010

Case No.: 2010-SOX-00009

In the Matter of:

EDWIN MOLDAUER,
Complainant,

v.

CANANDAIGUA WINE CO.,
J. MORAMARCO,
R. SANDS,
BRENT HANSSTON,
DARLENE PENN BORELLI,
RON FONDILLER, and
PAUL ZIEFF,

Respondents.

ORDER DISMISSING COMPLAINT

This proceeding arises under 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 “SOX”), and the applicable regulations issued thereunder at 29 C.F.R. Part 1980.

On August 31, 2009, Edwin Moldauer, Complainant, filed a SOX complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondents engaged in malicious prosecution against him in violation of Section 806 of SOX. The malicious prosecution allegation arises out of a lawsuit filed against Complainant in 2002 that was dismissed on June 3, 2009. The OSHA Regional Administrator found that the dismissal of the allegedly malicious lawsuit on June 3, 2009 did not constitute an adverse action and that Complainant did not file his complaint with OSHA within 90 days of the date that the allegedly malicious lawsuit was filed. On October 19, 2009, the Secretary found that Complainant’s complaint was untimely and dismissed the complaint. On November 19, 2009, Complainant filed a timely notice of appeal objecting to the Secretary’s findings and requested a *de novo* hearing before an Administrative Law Judge (“ALJ”) pursuant to 29 C.F.R. § 1980.106. On December 2, 2009, I issued an Order to Show Cause why the complaint should not be dismissed either for lack of timeliness or for failure to make out a prima facie case of discrimination under SOX. Complainant was directed to file his response no later than 30 days from the date of the

order, or no later than January 1, 2009. Complainant has not responded to the Order to Show Cause.

Discussion

Under the statute and applicable regulations, a Sarbanes-Oxley complaint must be filed not later than 90 days after the date that an alleged violation of the Act occurs. 18 U.S.C. § 1514A(b)(2); 29 C.F.R. § 1980.103(d). To be timely, Complainant must allege an act that occurred on or after June 3, 2009, which is 90 days before August 31, 2009. The only act alleged to have occurred after June 3, 2009, is Respondent Canandaigua Wines' dismissal of an action brought against Complainant in 2002.¹ To the extent that Complainant relies on any other act by Canandaigua, including the initial filing of the lawsuit, his complaint was untimely.

The applicable regulations further provide that Complainant must make out a prima facie case of discrimination, including a requirement that Complainant was subjected to an unfavorable personnel action. 29 CFR § 1980.104(b). To the extent that Mr. Moldauer bases his complaint on Respondent Canandaigua Wines' dismissal of the lawsuit against him, his complaint must be dismissed because the dismissal of a lawsuit against a former employee cannot, by any stretch of the definition, constitute a personnel action, and cannot be construed as an unfavorable act of any type.

Finally, the Complaint must be dismissed under 29 C.F.R. § 18.6(d)(2)(v), which provides for a decision to be entered against a party who fails to comply with an order of the presiding administrative law judge. Complainant did not respond to the Order to Show Cause, and has not communicated with this Office in any way since that Order was issued.

Conclusion

The Complaint in this matter must be dismissed because (1) Complainant failed to respond to the Order to Show Cause; (2) to the extent that the Complaint is based on actions taken by any Respondent before June 3, 2009, it was untimely filed; and (3) to the extent that the Complaint is based on the dismissal of the lawsuit brought against Respondent in U.S. District Court, it does not make out a prima facie case of discrimination.

¹ The lawsuit described by Mr. Moldauer in his SOX complaint is identified as *Canandaigua Wine Co., Inc. v. Moldauer*, Case #02-CV 06599 OWW DLB, filed in U.S. District Court in Fresno, California sometime in 2002 and dismissed on June 3, 2009.

ORDER

Based on the foregoing, IT IS ORDERED that the Complaint in the above-captioned matter be, and the same hereby is, DISMISSED WITH PREJUDICE.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
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, Suite S-5220, 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).