

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 February 2010

Case No.: 2010-SOX-00001

In the Matter of:

**TOMMY PARADISO,
Complainant**

v.

**TYSON FOODS, INC.,
Respondent**

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

This matter arises under the employee protection provisions of the Sarbanes-Oxley Act of 2002, (the Act or SOX), 18 U.S.C. § 1514A, brought by Tommy Paradiso (Complainant) against Tyson Foods, Inc. (Respondent).

Complainant filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) in August 2009, alleging he was fired by Respondent in retaliation for engaging in numerous activities believed to be protected under the Act. After an investigation by OSHA, Complainant was notified by letter dated September 22, 2009, that there was no reasonable cause to believe that Respondent violated the Act. Complainant filed a letter requesting a formal hearing with the Office of Administrative Law Judges on October 8, 2009.

Respondent filed a Motion to Dismiss Complainant's Complaint on November 18, 2009, arguing Complainant's allegations did not on their face establish "protected activity" necessary to invoke the subject matter jurisdiction under the Act in that they do not "definitely and specifically" relate to any of the listed categories of fraud or securities violations under the Act. An Order to Show Cause was issued by the Court on November 24, 2009, allowing Complainant thirty days to respond to the Court's Order and Respondent's Motion. Complainant was reminded of his thirty day deadline in an Order Denying Complainant's Motion to Withdraw his Claim on December 8, 2009, and was also advised by the Court that it did not have the authority to appoint counsel to represent him in this matter. On December 28, 2009, Complainant filed a Motion for Time Extension. Complainant's motion was granted, and he was given until January 24, 2010 to obtain counsel and file a response to Respondent's Motion and the Court's Order. Complainant was informed that no further time extensions would be granted and that the time between October 28, 2009 until the time this present matter is resolved would not be counted toward the 180 days Complainant has until being permitted to file for *de novo* review in the

appropriate United States District Court. As of the date of this Order, Complainant has not responded as ordered by the Court.

DISCUSSION

The Act prohibits discriminatory actions by publicly traded companies against their employees who provide information to their employer, a federal agency, or Congress that the employees reasonably believe constitutes a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission or any provisions of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A.

To state a claim under the employee-protection provisions of the Act, Complainant must allege that (1) he engaged in protected activity or conduct; (2) Respondent knew he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. Platone v. FLYi Inc., ARB No. 04-154, ALJ No. 2003-SOX-00027 (ARB Sept. 29, 2006); Halloum v. Intel Corp., ARB No. 04-068, ALJ No. 2003-SOX-00007 (ARB Jan. 31, 2006).

For the reasons discussed below, I find that Complainant's whistleblower claim does not allege any communication or action prior to his termination that would constitute protected activity under the Act. Specifically, Complainant's complaint provides:

1. Complainant filed a complaint with the Equal Employment Opportunity Commission (EEOC), dated August 11, 2009, after termination of his employment. Complainant stated to the EEOC that a "younger jack driver" was harassing him, which he reported to his supervisors Jesse Rivera and Toby Shearer.
2. Complainant wrote a letter to the Green Forest Police Department on August 12, 2009, after his termination, stating that another one of Respondent's employee's hurt him, that Respondent accessed his son's medical records, and that he was pressured to give a false statement in the course of an investigation of a sexual harassment complaint.
3. Complainant communicated to his immediate supervisor, Toby Shearer, that he was facing legal problems in New York City.
4. Complainant communicated to Shearer that a fellow employee, Dale Adams, planned to send a press release out on Respondent because Adams felt he had been wronged by Respondent.
5. Complainant communicated to Debbie Trost in Human Resources that she was mistaken about him failing to disclose injuries in his medical history.
6. Complainant communicated to Shearer that he was going to sue Respondent for accessing his minor child's medical records.

7. Complainant communicated to Trost that a supervisor with Respondent improperly touched another employee while at Complainant's home.
8. Complainant communicated to Shearer that Adams was going to file suit against Respondent.
9. Complainant communicated to Shearer that he would ask to use Adams' cell phone and hand it back to Adams while on the production floor allegedly in order to assist Shearer in terminating Adams' employment.
10. Complainant communicated to Shearer that if his "points weren't addressed by my peers because I had a right to a hearing which I was denied that I would not only file suit against Tyson but I would tell every newspaper I could about what had happened and what was going on as far as me being blackmailed, demoted, intimidated, blacklisted, fired and reporting them for the termination then rehire of Mr. Dale Adams for the suits he had brought against them, and for the USDA violations Mr. Adams had reported and was being disciplined for."

The Administrative Review Board has held that to constitute protected activity under SOX, "the employee's communications must 'definitively and specifically' relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1)." Platone v. FLYi, Inc., ARB No. 04-154, p. 17, ALJ No. 2003-SOX-00027 (ARB Sept. 29, 2006). As evidenced above, nothing in Complainant's complaint provides information about conduct he reasonably believed constituted a violation of mail fraud, wire fraud, bank fraud, or securities fraud, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A. As Complainant has failed to allege that he engaged in protected activity under the Act, his complaint must be dismissed.

ORDER

Respondent's Motion to Dismiss is hereby **GRANTED** and the complaint of Tommy Paradiso is hereby **DISMISSED**.

So ORDERED.

A

**LARRY W. PRICE
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).