



**Issue Date: 11 May 2011**

CASE NO.: 2011-SOX-00026

*In the Matter of:*

VANNESSA LUU,  
Complainant,

vs.

HEWLETT PACKARD, INC.,  
Respondent.

**ORDER DISMISSING COMPLAINT WITH PREJUDICE**

On February 23, 2011, I issued an Order to Show Cause Re: Dismissal with Prejudice in this case, in which I ordered Vanessa Luu<sup>1</sup> (“Complainant”) to submit evidence establishing that she filed timely and adequate objections to the October 22, 2009, findings of the Secretary of Labor dismissing her whistleblower complaint under the employee protection provisions of 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, *et seq.*, (“Sarbanes-Oxley,” “SOX,” or “Act”). I requested this evidence from the Complainant in order to determine whether she maintains a present right to proceed with her whistleblower claim in federal district court pursuant to applicable law.<sup>2</sup> In her initial complaint filed with the Occupational Safety and Health Administration (“OSHA”) in October 2009, the Complainant alleged that her former employer,

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<sup>1</sup> Prior Orders issued in this case contained an inaccurate spelling of the Complainant’s first name. This error has now been corrected.

<sup>2</sup> Section 806 of the Sarbanes-Oxley Act, under which the Complainant filed her complaint, grants a complainant the right to reinstate a whistleblower claim in the appropriate federal district court if the Secretary of Labor fails to issue a final decision in the case within 180 days of the date the initial complaint is filed. The Act provides:

A person who alleges discharge or other discrimination by any person in violation of [the Act] may seek relief . . . by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for *de novo* review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

18 U.S.C. § 1514A(b)(1)(B). This section of the Act is implemented by a nearly identical regulatory provision set forth in 29 C.F.R. § 1980.114(a).

Hewlett Packard, Inc. (“Respondent”), violated the employee protection provisions of Sarbanes-Oxley by subjecting her to disparate treatment and ultimately terminating her employment in retaliation for complaints she made to management concerning accounting irregularities. In dismissing her complaint on October 22, 2009, the Secretary informed the Complainant that she had 30 days from the date she received the Secretary’s determination to file objections and request a hearing on the full record, or the determination would become final and not subject to judicial review. *See* 29 C.F.R. §§ 1980.105(c), 1980.106(a).

In my Order to Show Cause issued February 23, 2011, I underscored that the record before me contained no evidence of any written objections by the Complainant within the 30 days prescribed by the Secretary and the applicable regulations. Indeed, the only written communication from the Complainant contained in the case file from the time period following the Secretary’s October 2009 determination was not submitted until February 2011, more than fifteen months after the Secretary’s determination was issued. This letter was submitted to the Chief Administrative Law Judge of the Office of Administrative Law Judges (“OALJ”) by the Complainant’s attorney on February 7, 2011, expressing the Complainant’s intent to pursue her SOX claim in federal district court pursuant to 29 C.F.R. § 1980.114. This February 2011 letter provided the OALJ our first notice of this case. On February 11, 2011, the date the letter was received, the case was docketed with the OALJ in our national office, and assigned a 2011 case number. On February 14, 2011, an officer of the national office contacted the Regional Administrator of OSHA to request copies of the Secretary’s findings and the Complainant’s original complaint. The matter was then referred to the San Francisco District Office on February 16, 2011, and the case file was received in San Francisco on the following day.

On March 7, 2011, I received the Complainant’s Response to my Order to Show Cause (“Response”). The Complainant attached to her 4-page Response her own unsworn declaration<sup>3</sup> (“Luu Decl.”), as well as sixteen documentary exhibits (Complainant’s Exhibits (“CX”) 1 through 16). In her Response and supporting documents, the Complainant seeks to establish two primary points: (1) her October 2009 complaint was timely filed with OSHA, and the Secretary’s findings to the contrary and resultant dismissal of her complaint<sup>4</sup> were premised on an incomplete view of the facts surrounding her employment by the Respondent in 2009; and (2) she submitted timely objections to the Secretary’s October 2009 determination, in the form of

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<sup>3</sup> Although the Complainant’s declaration purports to have been executed pursuant to 28 U.S.C. § 1746, which provides criteria for the completion of “[u]nsworn declarations under penalty of perjury,” her declaration did not contain the final signatory statement required by § 1746, “under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.” 28 U.S.C. § 1746(a). As such, her declaration does not constitute a declaration made under penalty of perjury, and it carries a lower evidentiary value than a declaration validly made under Section 1746. The notary public’s seal contained at the conclusion of the declaration certifies only that the Complainant’s identity was verified by the notary public on the date she signed the document, and does nothing to validate the contents of the declaration itself.

<sup>4</sup> The Secretary dismissed the complaint on the grounds that it was untimely filed more than 90 days after the alleged adverse employment action. *See* 29 C.F.R. § 1980.103(d). This determination was based on the Complainant’s statement in her complaint that she was terminated from her position January 1, 2009, although she did not file her whistleblower complaint until October 2009.

e-mailed and verbal communications with a member of OSHA's investigative staff, as well as formal written objections dated October 30, 2009, mailed to both the Regional Administrator of OSHA and the Chief Administrative Law Judge of the OALJ.

### DISCUSSION

#### *The Timeliness of the Complainant's Initial Complaint to OSHA is Irrelevant to the Present Determination*

As an initial matter, I will not address the evidence put forth by the Complainant to establish that her initial whistleblower complaint was timely filed with OSHA. The soundness of the Secretary's timeliness determination has no effect on my present consideration of whether the Complainant retains any right to continue to litigate this claim. Even in cases where no party disputes the timeliness of a complainant's initial submission to OSHA, if the complainant subsequently permits the 30-day objection period to lapse without taking action to file appropriate objections, the findings of the Secretary become final, and the complainant loses his or her right to proceed with the claim in any forum. *See* 29 C.F.R. §§ 1980.105(c), 1980.106(a).

Thus, the question of whether or not the Complainant's initial claim was timely filed is irrelevant to the present determination, which turns on whether or not her objections were timely filed. The factual soundness of the Secretary's original timeliness findings has no impact on this determination.

#### *The Evidence Presented is Insufficient to Establish Timely Written Objections to the Secretary's Findings*

In her Response and supporting documents, the Complainant argues that she submitted timely and adequate objections to the findings of the Secretary. First, she submits that she communicated her objections verbally and via electronic mail to Ranelle Newport, an OSHA investigative official. She states in her declaration:

Immediately after receiving Administrator McDaniel's notification, I emailed Ranelle Newport, WB Investigator Region 6, about Administrator McDaniel's "Findings" to request a conference call to discuss and challenge the Findings, to ask that they be reversed and to ask OSHA to investigate my claims. The following day I spoke with Ms. Newport and told her about being re-hired by HP and provided a narration of the events of my HP employment during 2009. Ms. Newport replied by email. In my follow-up email response to Ms. Newport dated October 23, 2009, I disputed the Findings that I had not filed my SOX complaint within the 90-day timeframe.

(Luu Decl. ¶ 24; Response, p. 2.) She includes in her exhibits this e-mail exchange between herself and Ms. Newport. On the morning of October 23, 2009, several days before the

Complainant received the Secretary's findings,<sup>5</sup> Ms. Newport wrote the following in an e-mail to the Complainant:

Ms. Luu,

I appreciate and understand your concerns. Please recall, I contacted you this morning and explained why the matter was deemed untimely. Your pay factors were known and discussed by OSHA management. You will receive a letter from the agency regarding the decision and any subsequent actions you may take. I believe any further actions will be taken in Region 9, which encompasses California.

(CX 9.) On the same day, the Complainant sent a reply e-mail to Ms. Newport. The Complainant began the e-mail by stating, "I strongly think that the DOL made a mistake on this case. Please let me explain." (CX 10.) The Complainant explained that although she "underst[oo]d that the termination occurred in Jan 2009," a number of factors persuaded her that she remained an employee of the Respondent after that date. (CX 10.) She concluded, "I am currently still and (sic) HP employee and I am still being retaliated (sic) for reporting to management the Accounting violations, I should be able to report to DOL to provide (sic) my rights." (CX 10.)

The Complainant also states in her declaration that she submitted "an additional explanatory letter to Ms. Newport," but does not provide a timeframe for when this additional letter was sent. (Luu Decl. ¶ 24.) In the undated letter, she provided additional information and concluded, "As I was 'an employee of HP' from Feb 2009 to Jul/Aug 2009, I am within DOL 90 days statute of limitations to file for protection under (sic) Sarbanes-Oxley Act." (CX 11; Luu Decl. ¶ 24.) She requested that Ms. Newport forward a copy of her concerns to OSHA's investigative team in California, and expressed a wish to speak to someone in OSHA's California office about the case. (CX 11.) The copy of this letter submitted with the Complainant's exhibits carries no date or time stamp, signature, or any indication as to how it was submitted to Ms. Newport, whether by e-mail or postal mail.<sup>6</sup> (CX 11.)

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<sup>5</sup> In her Response, the Complainant notes that she received the Secretary's October 22, 2009, determination letter "several working days after the date of the Findings." (Response, p. 3.) In the course of my consideration of this question, my law clerk had occasion to speak with the office of the Regional Administrator of OSHA in Texas and was informed that the Complainant personally signed for the Secretary's determination, which was sent via certified mail, on October 27, 2009.

<sup>6</sup> The Complainant also recounts in her declaration and supporting documents her verbal, e-mailed, and in-person contacts with officials of the Securities Exchange Commission ("SEC") in the October to November 2009 timeframe concerning her belief that the Respondent's accounting practices violated SOX. (Luu Decl. ¶¶ 29-31; CX 14-15.) These contacts with the SEC, a separate federal agency, concerning entirely distinct substantive concerns under SOX — addressing the alleged accounting irregularities and possible GAAP violations underlying her whistleblower claim, rather than the employment and retaliation aspects of the claim — are irrelevant to the Complainant's burden of showing that she timely and adequately objected to the Secretary of Labor's determination as to her retaliation complaint.

The Complainant also states that on October 30, 2009, she submitted formal written objections to the Secretary's findings, mailed to both the Regional Administrator of OSHA in Dallas, Texas, and the Chief Administrative Law Judge in Washington, D.C. (Luu Decl., ¶ 25.) She states in her declaration,

On October 30, 2009, I timely responded to Administrator McDaniel's "Findings." . . . A true and correct copy of my October 30, 2009, letter with the original enclosure to the "Regional Administrator, U.S. Department of Labor/OSHA" in Dallas, Texas, and to the "Chief Administrative Law Judge, U.S. Department of Labor/OSHA" in Washington, D.C., is attached to this Declaration as Exhibit 12.

(Luu Decl., ¶ 25.) The document contained in Exhibit 12 is a two-page letter with a 47-page supporting document recounting the Complainant's view of the relevant facts and law. (CX 12.) In the letter, the Complainant explained that she was terminated effective February 6, 2009, but later reinstated in mid-February 2009; again terminated on July 31, 2009; and finally terminated on October 30, 2009 — the very date of the letter presenting her objections. (CX 12, p. 1.) On the basis of these repeated terminations, she concluded that her October 2009 complaint was "still within the 90 days, [and] as such [she] should be protected under OSHA provision (sic) of Whistle Blow (sic) protection." (CX 12, p. 1.) Contained in the header of each of the 49 pages are the words "Attorney Client Privilege." (CX 12.) The copy of the letter she provided is unsigned, and she did not submit any proof of service or proof of mailing to either OSHA or the OALJ. The Complainant states that after submitting her objections, she received no further contact from the Department of Labor. (Luu Decl., ¶ 33.)

Despite her statements in her declaration that she submitted these written objections to the Secretary's findings on or about October 30, 2009, the evidence the Complainant presents provides me no reliable basis for accepting her claim that these objections were submitted to OSHA or the OALJ. As noted above, the Complainant presents no proof of mailing or service to either address listed on her October 30, 2009, letter, nor any other evidence capable of showing that such a letter was ever mailed or delivered. Despite the Complainant's contention that she mailed this letter to the national office of the OALJ and the Regional Administrator of OSHA, in fact neither office ever received this letter.<sup>7</sup> The only "proof" contained in the record that this document was ever mailed to any government office is the Complainant's own statement in Paragraph 25 of her declaration. (Luu Decl. ¶ 25.) As I footnoted above, this statement was not made under penalty of perjury, and as a result it carries little evidentiary value.

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<sup>7</sup> As noted above, in the course of my consideration of this case, my law clerk spoke to the office of the Regional Administrator of OSHA in Texas, and an OSHA representative informed her that no such letter from the Complainant was ever received by OSHA. In fact, OSHA's case tracking system shows no entries in the Complainant's case between the issuance of the Secretary's findings on October 22, 2009; the Complainant's signing of the certified mail slip on October 27, 2009; and the contact from the national office of the OALJ on February 14, 2011, requesting a copy of the Secretary's findings and the Complainant's original complaint.

Moreover, the imprint of the phrase “Attorney Client Privilege” on the October 30, 2009, letter raises questions in my mind as to the actual date of the document’s production. Evidence in the record supports a finding that the Complainant had not yet retained the assistance of counsel by the date this letter was ostensibly prepared. In her initial complaint to OSHA, submitted in early to mid-October 2009,<sup>8</sup> the Complainant had clearly not yet consulted an attorney. She stated in her initial complaint, “I would seek for (sic) legal counsel,” and submitted to OSHA a series of alleged violations, summarized under the heading, “What would I (sic) like you to counsel on and file for litigation on the below.” (Complaint, pp. 19-20.) In her declaration, moreover, she indicates that by the time she met with an SEC representative to discuss the Respondent’s possible accounting violations on November 12, 2009, she had still not yet retained an attorney. (Luu Decl. ¶¶ 30-31 (“Mr. Vasquez agreed to meet on November 12, 2009. . . . During my discussion with Mr. Vazquez, I asked him whether I needed to consult with an attorney. . . . He told me that hiring a lawyer would slow down the investigation process because if someone from his office needed to speak with me, they would have to first contact my lawyer . . . I understood that Mr. Vasquez did not believe it was necessary for me to hire legal counsel.”).) If this document was actually produced subject to a valid claim of attorney-client privilege, as the header logically indicates, then it cannot have been produced on the October 30, 2009, date when it purports to have been written and mailed.

The Complainant’s remaining communications with Ms. Newport are also inadequate to satisfy the written objections requirement. While the e-mail to Ms. Newport contained in Exhibit 10 provides date-stamped proof that the Complainant submitted written objections to a member of the OSHA investigative community after the Secretary’s determination was verbally communicated to her, this e-mail to an individual investigator on OSHA’s staff is insufficient to satisfy the requirements of 29 C.F.R. §§ 1980.105(c) and 1980.106(a), the relevant provisions of which were spelled out clearly on pages 1 and 2 of the Secretary’s October 22, 2009, determination letter, requiring written objections to be sent to the Chief Administrative Law Judge of the OALJ, with copies sent to the Respondent, the Regional Administrator of OSHA,

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<sup>8</sup> The record presents ambiguity as to when in October 2009 the Complainant submitted her initial complaint to OSHA. In her declaration, she represents that she filed her initial complaint with OSHA’s national office on October 1, 2009, and subsequently filed additional complaints with the SEC on October 15, 2009. (Luu Decl. ¶¶ 21-22.) In the Secretary’s findings, however, it was determined that the Complainant filed her initial Complaint with OSHA on October 15, 2009. (Findings, p. 1.) The copy of the initial complaint contained in the case file before me shows the complaint arriving to OSHA via a somewhat circuitous trajectory, initiated when the Complainant contacted the SEC by e-mail on October 14, 2009. On that date, the Complainant sent an e-mail to an undisclosed e-mail address under the designation “Enforcement.” (Complaint, p. 1.) In the body of the e-mailed complaint, the Complainant addressed the complaint to “SEC Investigation,” and internally dated the document October 1, 2009. (Complaint, p. 2.) The e-mail thread shows that on October 15, 2009, an individual by the name of David Gionfreddo — presumably an SEC staff member — forwarded the Complaint to three individuals, including Regina Barrett. (Complaint, p. 1.) On October 19, 2009, Ms. Barrett forwarded the Complaint to Ranelle Newport of OSHA, requesting that she “kindly forward this email to the right OSHA office,” based on the Complainant’s residence in California. (Complaint, p. 1.) On October 20, 2009, Ms. Newport replied, indicating that she would forward the matter to OSHA’s Regional Supervisor Anthony Incristi, who would “ensure it gets to the right party.” (Complaint, p. 1.) As the copy of the Complaint forwarded by OSHA to the OALJ contains this e-mail thread, initiated with the SEC on October 14, 2009, and terminating with a forwarded e-mail to Mr. Incristi on October 20, 2009, I have no basis for accepting an October 1, 2009, date of filing with OSHA.

and to the Department of Labor's Division of Fair Labor Standards. Additionally, the "additional explanatory letter" the Complainant claims she sent to Ms. Newport in this timeframe is also insufficient to satisfy these requirements, as the letter was again sent only to Ms. Newport, and the Complainant provides no date of transmission or proof of mailing.

In light of the Complainant's failure to provide adequate evidence to persuade me that she submitted timely and adequate written objections to the Secretary's findings, I must now dismiss her complaint with prejudice. In the absence of timely and adequate written objections, the Secretary's determination became final in late November 2009, 30 days after the Complainant received the determination, and she retains no further right of administrative or judicial review of her whistleblower complaint. *See* 29 C.F.R. §§ 1980.105(c), 1980.106(a).

### CONCLUSION

Based on the foregoing, it is hereby ORDERED that the Complainant's whistleblower complaint be DISMISSED WITH PREJUDICE.

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JENNIFER GEE  
Administrative Law Judge

*San Francisco, California*