



Issue Date: 21 June 2011

Case No.: 2011-SOX-00036

In the Matter of:

KARI BLAHO-OWENS,

Complainant,

v.

MERIAL LIMITED,

Respondent.

**ORDER OF DISMISSAL WITH PREJUDICE
AND
ORDER CANCELLING SCHEDULED HEARING**

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (Act), 18 U.S.C.A. § 1514A¹, and its implementing regulations found at 29 CFR Part 190. Section 806 provides “whistleblower” protection to employees of publicly traded companies against discrimination by employers in the terms and conditions of employment because of certain “protected activity” by the employee. The investigative report indicates that the Complainant filed this current complaint on February 8, 2010 and amended the complaint on September 3, 2010. The complaint was denied by the Regional Administrator, Occupational Safety and Health Administration, Atlanta, Georgia, on March 3, 2011. The Claimant filed her subsequent request for hearing before an Administrative Law Judge on April 1, 2011.

On June 1, 2011, Complainant, through her counsel of record, filed notice that “Complainant filed an action in the U.S. District Court for the Northern District of Georgia on May 26, 2011, incorporating all allegations in her Complaint before this agency as permitted by the Sarbanes-Oxley Act because the Secretary of Labor did not issue a final decision within 180 days of the

¹ VIII of the SOX is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, the employee protection provision, protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio and television fraud), 1344 (bank fraud) or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.

filing of the action, and thr (sic) delay in issuing a final decision was not due to the bad faith of the Complainant. See 18 U.S.C. § 1514(a). As a result of Complainant's (sic) Federal Complaint, this Agency has no subject matter jurisdiction over this matter. ... All of the allegations contained in Dr. Blaho-Owen's Complaint have now been properly brought before the United States District Court for the Northern District of Georgia. Complainant asks this agency to enter an order of dismissal without prejudice so that this case can be heard in the United States District Court for the Northern District of Georgia." It was judicially noted that the Complainant has not filed prior notice of intent to file a complaint in a U.S. District Court of appropriate jurisdiction pursuant to 29 CFR §1980.114(b). Since this was arguably a deficiency in the exhaustion of administrative remedies, the June 1, 2011, Motion to Dismiss was denied by Order of June 2, 2011.

On June 6, 2011, Complainant's counsel filed a "Notice of Intent to File Complaint in District Court" which he averred was served on opposing counsel by regular mail on June 3, 2011. Complainant's counsel stated his intent to file a complaint in U.S. District Court "in 15 days as this matter has been pending for more than 180 days without resolution by the Secretary." Fifteen days from filing was Tuesday, June 21, 2011.

On June 21, 2011, an action involving the Parties and the same issues of the above captioned matter was pending in the U.S. District Court for the Northern District of Georgia.

DISCUSSION

Title 18, U.S. Code, Section 1514A as amended, provides at (b)(1):

- (1) In general. – A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by –
 - (a) filling 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.

Implementing Federal Regulations at 29 CFR §1980.114 restate the foregoing statutory provisions in subparagraph (a) and further state in subparagraph (b):

- (b) Fifteen days in advance of filing a complaint in federal court, a complainant must file with the administrative law judge or the [Administrative Review] Board, depending upon where the proceeding is pending, a notice of his or her intention to file such a complaint. The notice must be served upon all parties to the proceeding. If the Assistant Secretary is not a party, a copy of the notice must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

The 15-day notice of intent to proceed with a lawsuit in a U.S. District Court required by the Act's implementing regulations at 29 CFR §1980.144(b) is "to afford the appropriate administrative body a final chance to resolve the matter ... This notice requirement is further evidence that Congress intended Sarbanes-Oxley claims to be resolved through the administrative process whenever possible, thus under scoring the importance of administrative exhaustion to the statutory scheme." *Willis v. VIE Financial Group, Inc.*, 2004 WL 1774575, *6 (E.D. Pa. 2004); *JDS Uniphase Corp. v. Jennings*, 473 F.Supp. 2d 705 (E.D. Va. 2007)(whether exhaustion of administrative remedies requires complainant to file with the Department of Labor a notice of intent to file a complaint in U.S. District Court 15-days before filing in U.S. District Court is a valid regulation and whether failure to file the required 15-day notice is problematic in this case since JDSU is entitled to summary judgment in Sarbanes-Oxley complaint); see also *Stone v. Instrumentation Laboratory Co.*, 591 F.3d 239 (4th Cir. 2009)(15-day notice of intent to file complaint with U.S. District Court filed with administrative law judge while complaint before that judge though Circuit Court implies de novo review a matter of right after 180 days have passed since original complaint filed with OSHA); *Hanna v. WCI Communities, Inc.*, 348 F.Supp. 2d 1322 (S.D. Fla. 2004)(administrative law judge issued decision after complainant filed 15-day notice of intent to file complaint and before complaint filed in U.S. District Court. Court held the plain language of the Sarbanes-Oxley Act does not require complainant to appeal judge's decision once 180 days had passed without receiving a final decision from the Department of Labor)

The 15-day notice requirement does not apply to cases where the underlying complaint was filed prior to implementation of the regulations on May 28, 2003. *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1374 FN 9 (N.D. Ga. 2004)

The record reveals that the Complainant filed this current complaint on February 8, 2010 and amended the complaint on September 3, 2010, thus the 15-day notice requirement of 29 CFR §1980.114(b) and provisions for removal to U.S. District Court after 180 days without a final decision from the Secretary apply. It is judicially noted that no bad faith has been established as related to the issue of removal to U.S. District Court.

ORDER

In view of all the foregoing, it is hereby **ORDERED** that **the formal hearing** scheduled to commence on **9:00 a.m., Tuesday, August 23, 2011 in Atlanta, Georgia, is CANCELLED and the above captioned matter is DISMISSED WITH PREJUDICE.**

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ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia