

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 21 June 2011**

CASE NO.: 2011-SOX-00034

*In the Matter of*

**RANDALL PITTMAN,**  
Complainant,

v.

**BANK OF AMERICA CORP.; COUNTRYWIDE  
FINANCIAL CORP.; SIEMENS AG; SIEMENS HEALTHCARE  
DIAGNOSTICS; RANDSTAD PROFESSIONALS US, LP; SAPPHIRE  
TECHNOLOGIES, LP; MATRIX RESOURCES, INC.; IMT  
CAPITAL, LLC; DELOITTE & TOUCHE, LLP; SEYFARTH  
SHAW, LLP; OGLETREE, DEAKINS, NASH, SMOAK & STEWARD, PC;  
CLIFFORD CHANCE, LLP; PAUL, HASTINGS, JANOFSKY &  
WALKER, LLP; O'MELVENY & MEYERS, LLP; MCGUIRE  
WOODS, LLP; JACKSON LEWIS, LLP; STONE, ROSENBLATT & CHA;  
KENNETH LEWIS; BARBARA DESOER; ANGELO MOZILO; TITUS  
WASHINGTON, JR.; MANATT, PHELPS & PHILLIPS, LLP; DAY &  
ZIMMERMAN GROUP, INC.; LITTLER MENDELSON, PC; MORGAN,  
LEWIS & BOCKIUS, LLP; BEN NOTEBLOOM; AND CHARLES MANATT;**  
Respondents.

**ORDER OF DISMISSAL**

This case arises under the whistleblower protection provisions of the Sarbanes-Oxley Act. *See* 18 U.S.C. §1514A. Complainant has named some 27 parties as respondents. On March 11, 2011, the Occupational Health & Safety Administration issued Secretary's Findings. The Administrator found no reasonable cause to believe Respondents violated the Act. Complainant filed objections, and the matter was docketed at the Office of Administrative Law Judges on March 24, 2011, and assigned to me on March 29, 2011. On May 3, 2011, I noticed a hearing to begin in Los Angeles on August 17, 2011.

On May 16, 2011, Complainant filed notice that he elected to pursue the matter in the federal district court. Congress provided complainants an option to bring an action in the district court when the Secretary has not issued a final decision within 180 days of the filing of the complaint

so long as there is no showing that the delay was due to the bad faith of the complainant. 18 U.S.C. §1514A(b)(1)(B); 29 C.F.R. §1980.114.<sup>1</sup>

Complainant has established the predicate needed to bring his case in district court. He filed his complaint with the Department of Labor (OSHA Region IX) by email on April 13, 2009. More than 180 days have run since that time, and the Secretary has not issued a final decision. Nothing suggests that any delay resulted from Complainant's bad faith conduct (or, for that matter, the bad faith of any party).

There is, however, a complicating factor. In his notice that he is filing the district court action, Complainant states that he will be pursuing that action against some, but not all, of the currently named Respondents, and that he intends to continue to litigate against certain other Respondents here.<sup>2</sup> He also states that he intends to pursue state law claims here.

The Sarbanes-Oxley Act does not create an option to split litigation into two forums. As the statute provides:

A person who alleges discharge or other discrimination by any person in violation of [the whistleblower protection provisions of the Act] may seek relief [under the Act's remedies provision] 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) (emphasis added). The use of the word “or” to separate the subsections that establish the two forums means that the forums are alternatives to one another; it doesn't establish a right to bring the claim against some respondents in one forum while simultaneously pursuing it against other respondents in the other forum. If Complainant elects the district court, he must pursue the matter in its entirety there. And as to Complainant's plan to add state law claims here, Congress gave this Office no jurisdiction to grant relief on state law claims.

Accordingly, on May 18, 2011, I issued an Order to Show Cause. I required Complainant to show why his presently pending action should not be dismissed in its entirety, given his election to pursue the claim in the district court. I required that he provide points and authorities to show that he may lawfully split the claim into the two forums. In the alternative, he could elect to

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<sup>1</sup> Complainant styles this as a “removal” to federal court. Technically, this is not “removal.” I construe it as notice as under 18 U.S.C. §1514A(b)(1)(B).

<sup>2</sup> Complainant stated that he would file in the district court against Siemens AG; Siemens Healthcare Diagnostics; Matrix Resources, Inc.; IMT Capital, LLC; DeLoitte & Touche, LLP; Seyfarth Shaw, LLP; Ogletree, Deakins, Nash, Smoak & Stewart, PC; Clifford Chance, LLP; Jackson Lewis, LLP; and Titus Washington, Jr.

He stated that he would continue the present litigation before this Office against Bank of America Corp.; Countrywide Financial Corp.; Ranstad Professionals US, LP; Sapphire Technologies, LP; Paul, Hasting, Janofsky & Walker, LLP; O'Melveny & Meyers, LLP; McGuire Woods, LLP; Kenneth Lewis; and Barbara Desoer.

remain in this present forum and not pursue the matter in the district court. Failing either of a basis in law to pursue the matter in both forums simultaneously or a withdrawal of the notice that he would pursue the matter in the district court, I would dismiss the action, which he can then pursue in its entirety in the district court.

Meanwhile, I observed that Complainant listed eleven party respondents on the case caption who were not included in the Secretary's Findings at Occupational Health & Safety below. In a separate Order to Show Cause issued on May 17, 2011, I required Complainant show why these parties should not be dismissed.

On June 10, 2011, Complainant responded to both orders. He neither withdrew the notice of intent to pursue his claim in the district court nor offered any authority that he may split the claim and litigate in both forums simultaneously.<sup>3</sup> Nor did he explain how he could pursue claims against parties not identified below at OSHA or what allegations he had against these parties. Therefore,

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<sup>3</sup> In his response to the Orders to Show Cause, Complainant persists in asserting claims in the present forum against seven of the respondents he earlier stated he'd pursue here. (They are Bank of America Corp.; Countrywide Financial Corp.; Randstad Professionals US, LP; Sapphire Technologies, LP; Kenneth Lewis; Barbara Desoer; and Angelo Mozilo.) He offers no authority that he may split the claim and litigate both here and in the district court simultaneously, and he never states that he will not pursue the district court action.

Complainant does dismiss from this administrative forum the respondents whom he'd identified for the district court litigation, but he expressly states that the dismissal is without prejudice. On this separate and alternative basis, I DISMISS without prejudice the ten respondents listed in footnote 2 above as the intended district court defendants. In doing so, however, I am aware that the dismissal *without prejudice* will not in itself preclude Complainant's pursuing these same parties in the district court, nor will it preclude his pursuing other parties in that forum. Complainant has not abjured the district court forum.

As to the eleven parties apparently not included in the litigation at OSHA below, Complainant failed to respond to the order to show cause other than to include among those being dismissed without prejudice seven of the eleven. Pleadings may be liberally amended. Had Complainant offered a basis to add these parties as respondents, it might have been possible to do so. But absent any motion or explanation in response to the order to show cause, these eleven respondents are DISMISSED with prejudice on this alternative basis. They are: Paul, Hastings, Janofsy & Walker, LLP; O'Melveny & Meyers, LLP; McGuire Woods, LLP; and Stone, Rosenblatt & Cha.; Matrix Resources, Inc.; IMT Capital, LLC; Deloitte & Touche, LLP; Ogletree, Deakins, Nash, Smoak & Steward, PC; Clifford Chance, LLP; Jackson Lewis, PC; and Titus Washington, Jr.

Complainant also dismisses without prejudice some respondents whom – although he'd initially named them – he hadn't identified on the notice of filing the district court litigation as parties he'd be pursuing in either forum. I accept this voluntary action and on this additional basis DISMISS without prejudice: Manatt, Phelps & Phillips, LLP; Day & Zimmerman Group, Inc.; Littler Mendelson, PC; Morgan, Lewis & Bockius, LLP; Ben Notebloom; and Charles Manatt.

Order

This matter is DISMISSED in its entirety as to all parties and all claims without prejudice on account of Complainant's election to pursue the matter in the federal district court. 18 U.S.C. §1514A(b)(1)(B); 29 C.F.R. §1980.114. Certain parties are dismissed with or without prejudice for additional reasons as set out in footnote 3 above.

SO ORDERED.

**A**

STEVEN B. BERLIN  
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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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).