

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 August 2011

CASE NO.: 2011-SOX-00029

In the Matter of:

RANDALL PITTMAN,
Complainant,

v.

**TEG STAFFING INC.; DALEY & HEFT, LLP;
ROBERT SVET; DENNIS W. DALEY; AND
ROBERT R. HEFT,**
Respondents.

ORDER OF DISMISSAL

This case arises under the whistleblower protection provisions of the Sarbanes-Oxley Act. *See* 18 U.S.C. §1514A. It is set for a trial to begin on August 15, 2011 in Los Angeles, California. In a Pre-Trial Order issued on May 2, 2011, I required the parties to file with this Office and serve on all other parties a Pre-Trial Statement at least 21 days before the scheduled trial date. These statements were due on or before July 26, 2011. The Pre-Trial Order expressly warns the parties that a “failure to comply with all aspects of this Order subjects the offending party to the exclusion of evidence at the final trial, the preclusion of issues, and other appropriate sanctions, including potentially the striking of pleadings,” *citing* 29 C.F.R. §§ 18.6(d)(2), 18.29.

Although Respondents filed their Pre-Trial Statement, Complainant did not. I therefore, scheduled a telephonic pre-trial conference to consider how to proceed. I conducted the conference on August 3, 2011, twelve days before trial was to begin. Complainant is unrepresented and was present on the telephone; Respondents were represented by their counsel of record.

When asked why he did not file a Pre-Trial Statement, Complainant stated that he had filed this action in the federal district court. Congress provided complainants an option to bring an action in the district court when the Secretary of Labor has not issued a final decision within 180 days of the filing of the administrative 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).

When a complainant elects a district court action, the Act's implementing regulations require:

Fifteen days in advance of filing a complaint in federal court, a complainant must file with the administrative law judge . . . a notice of his or her intention to file such a complaint. The notice must be served upon all parties to the proceeding.

29 C.F.R. §1980.114(b). Other than serving as notice to this Office that a case may be closed and notice to the other parties, for example, that an upcoming administrative hearing will not go forward, the regulation's notice requirement also permits opposing parties to object on the grounds that the complainant's bad faith caused the delay in administrative processing and that the district court action thus would be improper.

Here, Complainant conceded in the telephone conference on August 3, 2011 that he failed to notify this Office and any of the respondent parties at least fifteen days – or at all – before initiating the district court action; indeed. He left Respondents to prepare a Pre-Trial Statement; select, photocopy, and produce copies of all trial exhibits; and otherwise prepare for a trial when he knew that no such trial would be happening in the foreseeable future. By receiving service copies of Respondents' Pre-Trial filings, he essentially benefitted from “free” discovery of Respondents' plans for the trial.

Based on this record, I find that Complainant has acted consistent with a decision not to prosecute this case in this forum, and on that basis, I dismiss his complaint. *See* Fed.R.Civ.P. 41(a)(2).¹ As it exceeds this Office's jurisdiction, I leave it to the district court to determine whether to charge Complainant with Respondents' fees and costs incurred as a result of Complainant's failure either to prepare and go forward with the noticed trial before this Office or to notify this office and respondents timely of his decision to pursue the matter in the district court.

The hearing set for August 15, 2011 in Los Angeles, California is VACATED. This matter is DISMISSED without prejudice.

SO ORDERED.

A

STEVEN B. BERLIN
Administrative Law Judge

¹ Unless the Sarbanes-Oxley implementing regulations specifically address a procedural rule, they incorporate by reference this Office's generally applicable procedural rules codified at 29 C.F.R. Part 18, subpart A. *See* 29 C.F.R. §1980.107(b). Where our generally applicable procedural rules are silent about a particular situation, they incorporate by reference the Federal Rules of Civil Procedure. 29 C.F.R. §18.1(a). Our general rules are silent about voluntary dismissals of actions; I therefore look to Rule 41, Fed.R.Civ.P.