

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 03 January 2013

ALJ NO.: 2012-SOX-00034

ROBERT BETTENCOURT,
Complainant

v.

STATE STREET BANK AND TRUST CORPORATION,
Respondent

Before: Daniel F. Sutton, Senior Administrative Law Judge

Appearances:

Robert Bettencourt, Newton, Massachusetts, *pro se*

David S. Rosenthal, Esq. and Gauri A. Patil, Esq., *Nixon Peabody LLP*,
Boston, Massachusetts, for the Respondent

**ORDER DISMISSING COMPLAINT AND
DENYING RESPONDENT'S MOTION FOR ATTORNEY'S FEES**

On January 9, 2009, Robert Bettencourt (the "Complainant") filed a complaint with the Department of Labor ("DOL") alleging that the State Street Bank and Trust Corporation (the "Respondent") violated section 806 of the Sarbanes-Oxley Act of 2002, as amended ("Sarbanes-Oxley"), 18 U.S.C. § 1514A, by terminating his employment in retaliation for his actions in reporting concerns about alleged accounting improprieties in the Respondent's Eaton Vance client group. Following an investigation, the complaint was dismissed on July 11, 2012, by the Regional Administrator for DOL's Occupational Safety and Health Administration, acting as agent for the Secretary of Labor. On August 7, 2012, the Complainant objected to the Secretary's preliminary order dismissing his complaint, and requested a hearing before an administrative law judge ("ALJ"). By email received on December 6, 2012, the Complainant stated as follows:

Because of the inordinate amount of time my case has been at the Department of Labor, and Judge . . . Sutton's statement that I could bring my case to federal court I have decided to file my case in Federal Court.

Please consider my case withdrawn from the Department of Labor.

Under Sarbanes-Oxley, a complainant may seek *de novo* review in federal district court if the Department of Labor has not issued a final decision on a complaint within 180 days of its filing, and there is no showing that such delay is due to the bad faith of the complainant. 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114(a)(2010); *Lawson v. FMR LLC*, 724 F.Supp.2d 141, 151 (D.Mass. 2010), *reversed on other grounds*, 670 F.3d 61 (1st Cir. 2012). In an order issued on December 10, 2012, the ALJ notified the parties that he was construing the Complainant's email as notice of his intention to remove his complaint to district court. Accordingly, the December 10, 2012 order stayed the administrative proceeding and allowed the parties 14 days to show cause why the complaint before DOL should not be dismissed in order to allow the Complainant to proceed *de novo* in district court.

The Respondent has not opposed dismissal of the administrative complaint before DOL. However, in response to the Complainant's December 6, 2012 email, the Respondent filed a "Renewed" motion for attorney's fees in which it requests a finding that Complainant's actions during the administrative proceeding "have been taken in bad faith" and an order requiring the Complainant to pay it \$1,000.00 in litigation costs. Mot. for Atty Fees at ¶ 8.¹ The Complainant responded to the show cause order by filing a "Motion to Withdraw" in which he reiterates his intention to remove his complaint to district court and objects to the Respondent's motion for attorney's fees.

Dismissal of the Administrative Complaint

As set forth above, a Sarbanes-Oxley complainant has the right to seek *de novo* review in federal district court if DOL has not issued a final decision on a complaint within 180 days of its filing, "and there is no showing such delay is due to the bad faith" of the complainant. 18 U.S.C. § 1514A(b)(1)(B). In its motion for attorney's fees, the Respondent recites the history of its attempts while the case was pending before the ALJ to compel the Complainant to comply with its discovery requests that he appear for a deposition and produce documents relevant to his claims, and it requests that the ALJ find that the Complainant's actions in attempting to avoid and / or delay discovery amounted to "bad faith." However, even assuming *arguendo* that the Complainant's actions in resisting the Respondent's discovery efforts before the ALJ could be characterized as undertaken in bad faith, such actions cannot be found to have delayed a final DOL adjudication within the 180-day time limit which had long passed before the case ever reached the ALJ level. As there has been no showing or claim that the any bad faith attributable to the Complainant delayed a final DOL decision on his complaint beyond 180 days, there is no basis for refusing to dismiss the administrative complaint in order to allow the Complainant to proceed *de novo* in district court.

¹ The Respondent had previously requested imposition of monetary sanctions in the amount of \$1,000.00 in a motion to compel discovery and for sanctions filed on November 12, 2012. Following a telephonic status conference with the parties on November 13, 2012, the Respondent's motion to compel discovery was granted in part, and the motion for sanctions was taken under advisement. *See* ALJ Order (Nov. 14, 2012).

Motion for Attorney's Fees

Actions to enforce the employee protection provisions of Sarbanes-Oxley are governed by the rules and procedures set forth in 49 U.S.C. § 42121(b) which codifies the employee protection provisions of the Aviation Investment and Reform Act. 18 U.S.C. § 1514A(b)(2)(A). Section 42121(b)(3)(C) provides that “[i]f the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney’s fee not exceeding \$1,000.” 49 U.S.C. § 42121(b)(3)(C). The Sarbanes-Oxley implementing regulations similarly provide that “[i]f, upon request of the respondent, the ALJ determines that a complaint was frivolous or was brought in bad faith, the judge may award to the respondent a reasonable attorney’s fee, not exceeding \$1000.” 29 C.F.R. 1980.109(d)(2) (2012). To prevail on a request for attorney’s fees under these provisions, a respondent “must demonstrate that [the] complaint lacks an arguable basis in either law or fact.” *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-022, ALJ No. 2004-AIR-32, slip op. at 12 (ARB Jan. 31, 2006) (citing *Allison v. Delta Air Lines, Inc.*, ARB No. 03-150, ALJ No. 2003-AIR-14, slip op. at 6 (ARB Sept. 30, 2004)). Here, the Respondent asserts that the Complainant has engaged in a course of bad faith conduct and gamesmanship designed to frustrate its legitimate efforts at obtaining discovery before the ALJ. Mot. for Atty Fees at ¶¶ 1-8. The Respondent does not claim that the complaint was frivolous or that it was brought in bad faith, and any such claim would seem untenable in light of the Secretary’s preliminary findings that the Complainant engaged in activity protected by Sarbanes-Oxley and was terminated shortly after engaging in such activity. See Secretary’s Findings at 2 (Jul. 11, 2012). Therefore, the ALJ finds that no basis has been established for awarding attorney’s fees under the frivolous / bad faith complaint provisions. Finally, the ALJ further concludes that sanctions are not warranted at this point for the Complainant’s alleged failure to cooperate in discovery given the fact that he was appearing *pro se* before the ALJ and never failed to respond to any of the ALJ’s orders.

For the reasons set forth above, the Sarbanes-Oxley complaint before DOL is **DISMISSED**, and the Respondent’s motion for attorney’s fees is **DENIED**.

SO ORDERED.

DANIEL F. SUTTON
Senior Administrative Law Judge

Boston, Massachusetts

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).